UNIVERSITY OF CANTERBURY

ASPECTS OF SPECIFIC PERFORMANCE

A DISSERTATION PRESENTED

IN PARTIAL FULFILLMENT TOWARDS

THE DEGREE OF MASTER OF LAWS

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FOREWORD

Specific performance while being but one of numerous equitable remedies is a broad and many sided equitable doctrine. The nature of this paper does not allow an exhaustive examination of specific performance. Instead one is seeking to peruse selected aspects of specific performance. Hence damages and a cross section of equitable discretionary defences to performance have been selected. Such discretionary defences form various loose classes and several defences have been selected from each class. For example under the class of "Traditional defences" the paper considers (a) Mutuality and (b) Impossibility; whereas other traditional defences such as Laches and Acquiescence are left unconsidered. Moreover, "fairness", "hardship" and "clean hands" are investigated from the category of purely equitable defences. Further a hybrid class of defence is explored, which while being relevant from an equitable point of view, also may vitiate the entire contract at common law. Such class incorporates inter alia Mistake, Misrepresentation and Illegality.

Finally performance with regard to testamentary dispositions and the place of third parties in relation to performance are viewed as a special class.

In researching the aspects of specific performance including the history of the remedy, the fact that this area of equity was undergoing a restructuring became evident. Was specific performance altering to keep apace with changing commercial and social attitudes - equity being based squarely on morals and conscience both parameters being measured in terms of the accepted standards of society as a whole?

Do the recent spate of statutes which prima facia attempt to codify the common-law of contract enlarge the discretion to refuse specific performance?

This paper looks towards a re-emergence of the concept of conscience, the basis of all matters equitable, a concept that has been swathed in case law for at least a century. Hence Fry's major work on specific performance, is considered sparingly given its publication date of 1926. Further Spry's Third Edition of"Equitable Remedies" (1984) came to hand at a time which allowed only for brief reference to the same in footnotes.

It should be kept in mind when considering the New Zealand case law on specific performance as opposed to, say the English, that the New Zealand High Court is asked to be both the strict common lawyer and yet still be able to have regard to the length of the chancellors foot - the latter measurement holding sway in instances of conflict. It is ventured that this dual task causes principles, particularly in the damages field, to become confused.

The writer has attempted accurately to state the law as to the selected aspects of Specific Performance as at January 1985.

BRIEF HISTORY OF SPECIFIC PERFORMANCE

Only in the United States and the British Commonwealth is it permitted to invade the liberty of the individual so as to compel him specifically to perform his contracts.

Nemo potest proecise cogi ad factum was the maxim in Roman Law which gave title to damages as the sole right resulting from default in performance.

The slow growth of attempts to enforce contracts, was accelerated by an increase in commercial activity. However the stimulation of commerce also brought in the notion that money is the equivalent of everything, and therefore damages, it was assumed, would suffice in all cases of a breached contract. When the enforcement of contracts came into being where was it initially administered?

Legal historians are divided as to whether the Royal Courts or the Ecclesiastical Courts, including the Court of Chancery, could lay claim to initiating the relief.

Hazeltine in his essays on "Early English Equity"[1] ventures that specific performance was originally administered as part of the common law in the royal courts. The author points to a number of judgements during the reigns of Henry I and Henry II to support his theory.[2]

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1. Hazeltine, "Early English Equity", Essays (1913)
2. Supra @ P. 261

Ames[3] is of a similar view to Hazeltine. He takes several other leading legal historians[4] to task for suggesting that specific performance is one of the earliest forms of equitable relief. Ames proceeds to point out that Dyer J. in Wingfield v Littleton[5] expressly states that no subpoena would lie to compel specific performance of a contract, because there was an action of covenant at common law, and that most of the cases for which specific performance might have been sought had in the preceding century been brought within the purview of the action of case.

Ames cites a number of cases reported during the reign of Elizabeth I where specific performance of contracts was decreased by the royal courts.[6]

The stance adopted by Ames is underlined by the hostility of the common-law judges to the jurisdiction of equity over contracts. Such hostility was inflamed by the conflict between Coke and Ellesmere. As illustrations of this rift Ames addresses himself to two cases. The first was Gollen v Bacon[7] in which the comment was made that "there are too many causes drawn into chancery to be relieved there, which are more fit to be determined by trial at common law....". The second was Bromage v Geming[8] in which

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3. "Specific Performance", Lectures p.248

4. Spence and Fry L.J.

5. Dy 162a

6. Pope v Mason (1560) Toth 3; Hungerford v Hutton (1569) Toth62; Foster v Eltonhead (1582) Toth4; Kemper v Palmer (1594) Toth14; King v Reynolds (1597) Ch Cas Ch42; Beeston v Langford (1598) Toth 14.

7. 1 Bulst. 112

8. 1 Rolle R 368.

Lord Coke and the other common law Judges granted a prohibition to prevent a suit for specific performance on the ground that such a remedy ought not to be allowed to be given by the court of equity : "for then to what purpose is the action on the case and covenant". Undoubtedly the royal courts did not confine themselves as rigidly as they did in their latter days to the remedy of damages. On the contrary they gave various kinds of specific relief which, in later law, came to be associated with the Chancellor. Hazeltine emphasises that this relief they gave both to enforce obligations connected with property and contract and to prevent various kinds of wrong to property. Fry, while not going so far as to say that the Common Law Courts specifically enforced contracts, does recognise that there were certain cases in which they made near approaches to it. He outlines four such situations the fourth being of particular relevance, in light of Hazeltine's statement.

The fourth instance concerns cases arising on covenants real. According to common law a covenant by A to transfer land to B (called a covenant real) could be enforced by writ of covenant which was in the nature of a specific performance of that covenant. The writ was to the Sheriff to command A that he keep his covenant with B. The relief for non-performance was not in damages but by means of a pracipe quod reddat of the land in question.

It is submitted that it is misleading to speak of specific performance as we know it in modern times, as the specific relief given by the royal courts in the later medieval period was not based upon the same principle as that used by Chancery.

The Royal Courts did not start as Chancery did from the principle that Chancery did that it was just and equitable for a man to perform what he had promised to do - as the common law courts in Bractons day did not make a practice of enforcing promises.[9]

The common law courts started from a basis of real actions. The distinguishing character of real actions was the specific relief that could be obtained from them. If an action was personal, damages only could be obtained. But if the action was a real action specific relief could be obtained. The very nature of the action presupposed and demanded it. However these principles are only analogous to later equitable rules, as specific relief at common law was not based on the conscience of a person, but upon the general ground that a wrong was committed if the particular interest in land was used in such a way.

If every breach of faith was cognizable in the church, it would follow that to pledge the faith was to create an obligation cognizable in the spiritual courts.

Fry appears to have extricated the foundation of specific performance, a foundation which, if specific performance is looked at in its modern sense, places its origin in the Court of Chancery. He alludes to contracts in which there was an oath or Pidei interpositio.

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9. Holdsworth "A History of English Law" Vol.V. 321.

During the sixteenth and seventeenth centuries certain principles are discernable from the opinions given by the Chancellors. One such principle is that the Chancellor would interfere to enforce contracts on very different grounds than those used by the common law.[10] As stated above the common law could only "enforce a contract" by way of Action of Covenant (this only being avoidable if the contract was in writing and under seal). Having no adequate remedy, Holdsworth[11] explains that the common law courts developed no adequate theory of consideration. They had not grasped the idea that the essence of contract was consent, and under certain circumstances this gave rise to actionable obligations. Chancery was always of the view that breach of such obligations were a breach of faith and therefore a sin. These breaches were matters of conscience, and as the common law courts were reminded "you must not allow conscience to prevent your doing law". The Common Law vehemently opposed the granting of specific performance by the Chancery, complaining that the Chancery were meddling with the English land system of free hold titles (Heath v Rydly)[12] and that there would be no need for the action on the case if specific performance could be granted by the Chancery (Bromage v Geming)[13]. Holdsworth[14] is of the opinion that the whole of the law of contract would have eventually fallen under the jurisdiction of the Chancery if the conflict between the

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10. Note: Cuddee v Rutter (1720) 2WPT 368;
Somerset v Cookson (1735) 2WPT 404;
Pusey v Pusey (1684) 1 Vern 273.

11. Holdsworth "History of English Law Vol. V 322-3

12. 10 Ch.22.

13. Supra.

14. Supra.

common law Judges and the Chancellors had not roused the former to action. From the middle of the fourteenth century they developed an action of trespass on the case and through this theory the common law theory that simple contract is an agreement based upon consideration was developed. In consequence of this development the interference of equity was tendered less necessary ; but it was not rendered wholly unnecessary, as the only remedy the common law courts could give was damages.

It was during the seventeenth and eighteenth centuries that the modern rules relating to specific performance as we know it were formulated. For Examples Lord Selborne L.C in Wilson v Northampton and Banbury Junction Railway Co[15] "The Court gives specific performance instead of damages only when it can by that means do more perfect and complete justice". And further in Penn v Lord Baltimore[16] it was established that in relation to specific performance equity always acts in personam.

Hence having risen from the conscience of the chancery, specific performance is special and extraordinary in its character, and the court has a discretion either to grant it, or to leave the parties to their rights at common law[17]. However the discretion is not an arbitrary or capricous discretion; it is to be exercised according to equitable principles and previous authority given the facts of each case.[18]

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15. (1874) 9Ch App 279

16. (1750) 1 Ves Sen 444

17. Re Scott & Alvarex's Contract, Scott v Alvarex (1895) 2Ch603

18. Knatchbull v Hallet (1880) 13 ChD 699 @ 710 ;
Bennet v Smith (1852) 1b Jur 431

A INHERENT JURISDICTION TO AWARD EQUITABLE DAMAGES

It is a widely held belief that prior to the passing of Lord Cairn's Act equity could not award damages as such[1]. If specific performance was refused, by the Chancery, the plaintiff had to proceed in the Courts of Common Law, and by writ there seek his damages if he was entitled to them[1a]. There was before the passing of Lord Cairn's Act a notion, alluded to by Goff. J in Grant v Dawkins[2], that a court of equity, if it refused specific performance, might give compensation for breach of contract.

It was established from the earliest of times that Chancery would not entertain an action for damages where damages were the principal relief sought[3]. But the position was not so clear where damages were sought in addition to or in substitution for specific performance. This concept was initially expounded in Cleaton v Gower[4].

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1. See Souster v Epsom Plumbing per McMullin J [1974] 2 NZLR 515 @ 519. Snell Principles of Equity 28th Ed @ 572 Bosaid v Andry [1963] VR 465 @ 484 Pettit "Equity & the Law of Trusts" 3rd Ed @ 408

1a. Generally as to Equitable Damages see : Gummow Meagher & Lehane "Equity, Doctrines & Remedies" 2nd Ed Para 2301 ff; Spry "Equitable Remedies" 2nd Ed @ 541

2. [1973] 3 ALLER 897 @ 899

3. Hooker v Arthur (1671) 2 ChR 62

4. (1674) Cas + F 164

This case clearly illustrates that at an early time the court of Chancery did not disclaim jurisdiction in respect of damages, where they were incident to the subject matter already in contention before the court. In Cleaton v Gower[4a] Lord Nottingham L.C. tried a suit seeking specific performance of an agreement concerning a mining lease and also damages for the defendant's failure to execute the lease.
Kenyon M.R. reaffirmed this principle one hundred years later, after specific performance for an agreement for the sale of a cottage was refused because of the conveyance of the cottage to a bona fide third party purchaser for value. His Lordship was of the opinion that there was such a part performance of the agreement on the part of the plaintiff (such as furnishing and repairing) as would entitle her to specific performance, however because of the conveyance to the third party there was no decree for specific performance possible therefore his Lordship referred the matter to the Master for an enquiry as to damages.[5]
Herein lies one of the reasons for the inherent power to award damages, that being, where the inability of the party to perform grows out of an act done by that party, after the contract has been entered into.
A case in point which expressly refers to and follows the reasoning of Kenyon M.R. is Greenaway v Adams[5a]. The Master of the Rolls recognised that Denton v Stewart[5b] allowed the Chancery in certain circumstances to award damages. This was a case involving a breach after the contract had

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4a Supra n.4

5 (1786) 17 Ves 276

5a Denton v Stewart (1806) 12 Ves 395

5b Supra n.5

been entered into. His Lordship was unsure how far Kenyon M.R. meant the principle to extend.

If the Chancery had this jurisdiction to award damages before Lord Cairn's Act it is submitted that they found it ordinarily undesirable, since this was a remedy which was available at common law, common law possessing more adept procedures for quantifying the amount of damage suffered[6]. Noticeably there were shades of the modern trend[6a] towards Banco Civil trials, when the Master of the Rolls commented, with respect to Chancery's quantifying of damages[7], "I think the Master just as competent to decide this as a jury"[8].

It appears from the cases that the second reason for the development of the inherent jurisdiction was the desirability of having all matters heard in the one court. In the course of his judgment in Nelson v Bridges[9] the Master noted "that it is not necessary for the Court when it has once entertained jurisdiction in a case to resort to that circuitous mode of giving relief...."[9a]

Such rationale was repeated some three years before the enactment of Lord Cairn's Act. The case was Phelps v Prothero[10] and it is ventured

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6 Such as determination by jury.

6a NB New Zealand and the diminution of the jury system.

7 Before Lord Cairns Act.

8 Greenaway v Adams (Supra) @ 402

9 (1839) 2 Beav. 239 @ 243

9a Also City of London v Nash (1747) 3 Atk. 512, Chalic v Pickering (1836) IKE 749

10 (1855) 7 De GMPG 722.

that the views of the Lord Justices in this case may well have precipitated, along with the Third Report of the Chancery Commissioners[11], the eventual passing and substance of Lord Cairn's Act. Turner L.J. [12] was adamant that a plaintiff, who has legal rights, and who comes to a court of equity is bound to put his legal rights under the Control of the Court of equity. In the case at hand the plaintiff, having sued in equity for specific performance was bound to submit his claim for damages to the judgment of the Chancery and was not entitled to proceed at law otherwise than by leave of the Court. His Lordship not only went on and stated that a court of equity could give damages in addition to specific performance[13], but also that a plaintiff ought not to seek

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11 (1856) Parliamentary Papers Vol. 22

12 Phelps v Prothero Supra @ 734.
Note Oakacre Ltd v Claire Cleaners Ltd [1981] 3 WLR 761 @ 764 per Mervyn Davies J.

13 "That it was competent to this Court to have ascertained the damages, I feel no doubt. It is the constant course of the Court, in cases between vendor and purchaser, upon a sufficient case being made for the purpose, to direct an inquiry as to the deterioration of the estate pending the contract, and in so doing the Court is in truth giving damages to the purchaser for the loss which he has sustained by the contract not having been literally performed. This Court, when it entertains jurisdiction, deals as far as it can with the whole case, and not with part of it only; and it is well settled by authority that a Defendant cannot be allowed, without the leave of the Court, to proceed at law on the subject-matter of the suit, whilst proceedings in this Court are pending. " Supra n.12 @ 734.

relief in equity by way of specific performance and damages at law, as to proceed at law while matters were before the Chancery seems to have been considered a contempt[14].

In fairness one must consider Todd v Gee[15], in which Lord Eldon L.C. declared that Denton v Stewart[15a] "went against the whole course of previous authority"[16].

Care must be taken with these cases involving the inherent jurisdiction of Chancery to award damages, as these cases could easily be treated as possible instances, where, as a condition of decreeing specific performance equity required an abatement in the purchase price by reason of, for example, a defective title. This was an example of the equitable power to impose terms on relief and, as Lord Eldon L.C. emphasised in Todd v Gee[17], was "very different" from an award of damages[17a].

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14 Frank v Basnett (1835) 2 Myl & K 618
Bell v O'Reilly (1805) 2 Sch & Lef 430

15 (1810) 17 Ves 273 @ 278

15a (1806) 12 Ves 395

16 The severity is lessened by the following @ 278
"The Plaintiff must take that remedy, if he chooses it, at Law; generally I do not say universally, he cannot have it in Equity ; and this is not a case of exception".

17 Supra n. 16

17a Gummow Meagher & Lehane "Equity, Doctrines & Remedies" 2nd Ed @ Para 2304.

The last mentioned case, with its adverse comments upon the granting of damages at equity[18], sets up a broad distinction between compensation and damages, the extent and measure of the one being regarded as different from that of the other. So that if "A" contracted to sell to "B" a property titlefree, and "B" contracted to sell the same unemcumbered land to "C". Subsequently if it was found that "A" could not convey the property entirely titlefree, "A" might be compelled by the court to make compensation for the amount of land that was not titlefree, but not for the damages sustained by "B" arising from him being unable to complete his contract with "C". Subsequent to the enactment of Lord Cairn's Act, the High Court of Australia on two occasions[19] stated their preference for the inherent jurisdiction to award damages. The court considered that the jurisdiction to award damages was exerciseable in equity because "the court has possession of the cause, and not because it first had possession"[20]. Moreover the court considered that all this demonstrated that in such matters equity "regards not technicality but justice".[21] Further one of the leading reasons for such a

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18 Before the passing of Lord Cairn's Act.

19 Fuller Theatres' v Musgrove (1923) 31 CLR 524
King v Piggiolo (1923) 32 CLR 222

20 Supra n. 19 Fullers Theatres v Musgrove @ 547 per Isaacs J. & Rich J.

21 Supra n. 20 @ 247 per Isaacs J. & Rich J.

jurisdiction was to avoid a multiplicity of actions. One of the fundamental reasons for the enactment of Lord Cairn's Act.

In summary of the instances where this jurisdiction may be used one has ; cases of delay[21a]; instances where the alleged damage is intimately connected with the proceedings in respect of which principal relief is sought by way of specific performance[21b] ; occasions where the defendant by his wrongful act after the commencement of proceedings renders specific performance impossible[21c]; cases where for some reason it is found undesirable to force the plaintiff to resort to his remedy at law and instances where the defendant has acted in disobedience to an order of the court[21d].

Moreover to summarise the overall position as to the granting of equitable damages before 1858 it is submitted that (a) Chancery had no jurisdiction to award damages on their own account; however (b) depending on the length Kenyon M.R.'s comments are taken in Denton v Stewart[21e] damages, in certain circumstances[22], could be awarded in lieu of or in addition to specific performance.

21a Phelps v Prothero [1855] Ch 722

21b Supra.

21c Todd v Gee Supra

21d King v Pigiolli (1923) 32 CLR 222.

21e (1806) 12 Ves 395

22 See the preceding paragraph.

Section 5 of the Supreme Court Act 1860 ensures that the High Court of New Zealand[23] has all the equitable and common-law jurisdiction of the Lord High Chancellor of England, the Court of Chancery, or any other superior court of equity has in England. Hence, it is submitted, that the High Court of New Zealand retains an inherent jurisdiction to award damages in equity[23a].

Given the ever increasing jurisdiction of the District Court, one wonders whether this also has an inherent jurisdiction to award damages when it decrees specific performance under Section 34 (1) (b) of the District Courts Act 1947 or uses its Ancillary Jurisdiction[24] or Equity and Good Conscience jurisdiction[25].

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23 By reason of the Supreme Court Act 1882 Section 16 and the Judicature Amendment Act. [1972]

23a Notwithstanding that New Zealand is subject to a Judicature Act System (i.e. a fused system of common law and equity). Submitted that such a system reinforces the inherent jurisdiction.

24 Section 41 District Courts Act 1947.

25. Section 59 District Courts Act 1947. The monetary limit on this section, in practical terms, precludes a grant of specific performance i.e. very few properties may be purchased for under $12,000 nowdays.

While there is scope for a District Court to award damages under Lord Cairn's Act [25a] and given that Section 41 of the District Courts Act says that when granting equitable relief under this section the District Court shall give such relief "as ought to be granted or given in the like case by the High Court and in as full and as ample a manner", it is submitted that the District Court does not entertain this inherent jurisdiction. For the District Court is a creature of statute and does not possess the power to assimilate an inherent jurisdiction.[26] The authority to award equitable damages within Lord Cairn's Act remains vested in the District Court, but this is by reason only of its statutory grounding[27].

What is the moment of the inherent jurisdiction nowdays?

Because the High Court has both legal and equitable jurisdiction under the Judicature Act the inherent jurisdiction has fallen into disuse.

25a Section 41 District Court Act 1947 (Ancillary Jurisdiction).

26 Section 3 District Courts Act 1947

27 Wiley & Crutchleys' "District Court Practice" 5th ed @ 40.

However there are instances, particularly on the floor of the court[28], when the inherent jurisdiction can be coerced into action. Particularly, where the court has no "jurisdiction"[29] in the material sense, to grant specific performance and therefore it is inappropriate to grant statutory damages under Lord Cairn's Act. The inherent power is unfettered by the prerequisites necessary to invoke Lord Cairn's Act. It is submitted that unconsciously Parliament has embodied this inherent jurisdiction, to a lesser extent, in statute, by the enactment of those statutes which seek to begin to codify the law of contract[30]. The far reaching discretions that these Acts clothe a court with, in light of the freedom and flexibility of the discretions contained in these acts, can be seen to be a printed form of inherent jurisdiction[31]. Such sections contemplate the award of undisturbed damages or compensation by a court, if the court thinks fit or just.

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28 As it is submitted that in the prayer for relief such use of the court's inherent powers need not be expressly pleaded; they falling under the clause in the prayer for relief "such further or other relief as this Honourable Court thinks just".

29 As to a court of equity not having jurisdiction to grant equitable damages see Spry "Equitable Remedies" 2nd Ed @ 58.

30 Contractual Mistakes Act 1976.
Contractual Remedies Act 1979.
Contracts Privity Act 1983.

31 Section 7 Contractual Remedies Act 1979
Section 7 Contractual Mistakes Act 1976
Section 4 Contracts Privity Act 1983

B THE CHANCERY AMENDMENT ACT 1858

Section 2 of Lord Cairn's Act provides " In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damges to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct".[32]

Although Lord Cairn's Act has been repealed[33], the jurisdiction has been preserved, as explained by the House of Lords in Leeds Industrial Co-operative Society v Slack[34]. The present position is that the High Court of New Zealand now has both this equitable jurisdiction, and under the Judicature Act, the jurisdiction which the common law courts had before 1875 to award damages. The distinction between these two types of damages is becoming less pronounced with the onset of cases like Johnson v Agnew[35].

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32 21 & 22 Vict., C 27 , S 2.

33 By the Statute Law Revision Act 1883, S.3.

34 [1924] Ac 855 @ 861-2

Also Sayers v Collyer (1884) 28 Ch.D103

35 [1979] 2WLR 487

The main object of Lord Cairn's Act was to enable the Court of Chancery to do "complete justice" between parties by awarding damages in those cases in which it had formerly refused equitable relief in respect of a legal right and left the plaintiff to sue for damages at common law. This is the most recent view ascribed to the objects of Lord Cairn's Act.[36] Earlier in Ferguson v Wilson[37] the object of the Act was said to be to prevent a litigant being bandied about from one court to another and to enable the Court of Chancery to do complete justice. Since Lord Cairn himself was a member of the court in this case, the above explanation is presumably accurate. Moreover Goff L.J. in Price v Strange[38] considered that the purpose of the Act was "to prevent parties from being so sent from one court to another[39]". In other words the cases appear to indicate that the object of the 1858 Act was a purely procedural one. It was not intended to alter the settled principles on which specific performance and injunction were awarded.[40] Its effect was, in a limited fashion to fuse law and equity.[41]

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36 Wentworth v Woollhara Municipal Council (1982) 56 ALR 745

37 (1866) 2 Ch App 77.

38 [1977] 3 WLR 943

39 Supra n. 38 @ 957

40 Rock Portland Cement Co Ltd v Wilson (1882) 52 L J Ch 214 ; Shelfer v City of London Electric Lighting Co [1895] , Ch.287 (C.A.)

41 See Jolowicz [1975] CLJ 224, 225

In hindsight it appears that the actual effect of Lord Cairn's Act was different from its limited procedural purpose. Because of its increased jurisdiction the Chancery attracted a great number of cases which would ordinarily have gone to the Common Law Courts. This has become pronounced with the onset of inflationary times and the difference in assessment of equitable and common law damages.[42]

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42 However this point is no longer of significance with the decision of the House of Lords in Johnson v Agnew (Supra) fusing the assessment of the quantum of damages at common law and equity.

B (1) LORD CAIRN'S ACT IN NEW ZEALAND

Both Lord Cairn's Act and Sir John Rolt's Act were in operation in England when the Supreme Court Act 1882 came into operation in New Zealand, they not having been repealed until 1883. Prior to that date similar but enlarged provisions had been incorporated in the Judicature Act 1875.

Section 5 of the Supreme Court Act 1860 enacted that "The Court shall also have within the colony all such equitable and common-law jurisdiction as the Lord High Chancellor of England, the Court of Chancery or any other Superior Court of Equity hath in England". The Supreme Court Act 1882, repealed the Act of 1860, but section 16 of the 1882 Act provided that the Supreme Court shall continue to have all the jurisdiction which it had at the time of the commencement of the 1882 Act.

Given this legislative grounding the Court of Appeal had no doubt in Ryder v Hall[1] that the Supreme Court had full power to award damages either in lieu of or in addition to an injunction as the Court of Chancery in England possessed under Lord Cairn's Act.[2] This decision has received approval and damages have been considered in Dell v Beasley[3], Attorney General v Birkenhead Borough[4], Souster v Epsom Plumbing Ltd[5].

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1. (1905) 27 NZLR 385 @ 394
2. See also Dillon v MacDonald (1902) 11 NZLR 375 @ 388
3. [1959] NZLR 89
4. [1968] NZLR 383
5. [1974] 2NZLR 515

More recently the Judicature Amendment Act 1979 has transferred this jurisdiction from the Supreme Court to the High Court. It is submitted that New Zealand is one of the few common-law countries still relying on the express words of the original Chancery Amendment Act 1858. As even though this Act was repealed in England, by virtue of Section 5 of the Supreme Court Act 1882, it was assimilated into the statute law of New Zealand, where it has yet to be altered. In the Australian States the provisions of Lord Cairn's Act have been incorporated with some minor changes into concrete[6] statutory form.[7]
All the sections and references to Lord Cairn's Act do not vary in any material particular from their English source. Therefore the construction given in any one common-law country to the Act is of "considerable moment" in New Zealand[8].

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6. New Zealand's provision not being concrete, in that it is not contained expressly in a statute but is ascertainable by reference to previous statute law.

7. Supreme Court Act 1958 (Vic) 5.62
Supreme Court Act 1935 (SA) 5.30
Supreme Court Act 1935 (WA) 5.25
Supreme Court Civil Procedure Act 1932 (Tas) 5.11
Judicature Act 1876 (Qld) 5.4

8. Per McMullin J. Souster v Epsom Plumbing Ltd [1974] 2 NZLR 515 @ 519.

While there is an undoubted need for a District Court to be able to award damages in addition to or in lieu of an order for specific performance, it is submitted that there is no statutory or common law authority to do so.

Wiley and Crutchley in their invaluable text on District Court practice believe that such a jurisdiction lies with the District Court but are unable to support their proposition with any authorities.[9] By virtue of Section 34 (1) (b) of the District Courts Act 1947 specific performance may be granted in this court if the purchase price is under $12,000. There is no mention of damages. The only section which adds a gloss to Section 34 is Section 41 of the same Act. This section being directory and not adding any express authority as to damages.

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9. Wiley & Crutchley "District Courts Practice" 5th Ed @ 40.

B (2) THE JURISDICTION TO AWARD DAMAGES

Per Brett L.J. Tamplin v Jones (1880) 15 ChD 215 @ 221

"It would be dangerous to attempt an exhaustive definition of the cases in which the Court will refuse specific performance. The jurisdiction is a delicate one, and the more so since the fusion of Law and Equity, for if the Court refuses specific performance it must now, in my opinion, consider the question of damages."

Before an award of damages is made, there are two threshold questions (1) whether the court has jurisdiction to award damges, and secondly (2) if it has jurisdiction whether it will exercise its jurisdiction and award the damages.

B (2)(i) THE FIRST THRESHOLD QUESTION

The Act was enacted on the recommendations of the Chancery Commission. The Commission preferred that the award of damages be made as of right rather than being discretionary as Section 2 provided for. On the face of it the Acts primary limitation was that for the jurisdiction to be invoked, a plaintiff had to demonstrate that at the time of the commencement of his suit the plaintiff could make out the ingredients of a case for specific performance.[1]

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1. Boyns v Lackey (1958) 58 SR (NSW) 395.
   J.C. Williamson Ltd v Lukey and Mulholland (1931) 45 CLR 282.

However there is a divergence of authority on this aspect. Another view would have us believe that it is not necessary to prove, that a court of equity would, in the absence of a special power to award damages, have exercised its discretion in such a manner as to grant specific performance. In short this approach is that the statutory power of awarding damages subsists whenever at the material time the contract in question is susceptible of specific performance, whether or not specific performance might be declined on a discretionary ground[2].

Such an approach was averted to in The Millstream Pty Ltd v Shultz[3], where McLelland J felt that the section "confers a power to award damages only where, at the time of the commencement of the proceedings, the facts were such that the court could have properly ordered specific performance, sub; ect perhaps to discretionary defences"[4]. Very recently such a view has been accepted in the High Court of Australia in Wentworth v Woollahra Municipal Council[5].

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2. Spry "Equity as a Remedy" 2nd Ed @ 545 fn. 15 in addition to the cases of Dell v Beasley [1959] NZLR 89 ASA Construction Pty Ltd v Iwanou [1975] 1 NSWLR 512, Edwards Street Properties v Collins [1977] QB 399

3. [1980] INSWLR 547

4. Ibid @ 552

5. (1982) 42 ALR 69.

The cases which support the former view[6] claim that Lord Cairn's Act does not extend the jurisdiction of the Court, and damages will not therefore be given in cases where, previously to the Act, the Court would not have decreed specific performance.[7]

This stance is supported by Starke. J in King v Poggiolio,[7a] a case in which the vendor agreed to sell the purchaser a pastoral property. Possession did not pass on settlement date. However, it was held that the vendor was not entitled to a decree of specific performance, because he had failed to prove his readiness and willingness to perform his

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6. Boyns v Lackey Supra n.1
King v Piggiolo (1923) 32 CLR 222
J.C. Williamson Ltd v Lukey and Mulholland Supra n.1

7. Daniel's Chancery Practice 5th Ed Vol. 1 946;
Also see Sefton v Tophams Ltd [1965] Ch 1140.
This case asserts that Lord Cairn's Act did not revolutionise the principles upon which the equitable jurisdiction was to be exercised and that some special case must be shown before the court should exercise the jurisdiction to award damages under the Act.

7a. (1923) 32 CLR 222.

part of the contract. It was further held that, although damages for delay were recoverable at common law, because no decree of specific performance would issue,the vendor was not entitled to damages at equity.

The difference between the two approaches can be shortly summarised by saying that in the former[8] statutory equitable damages will not be awarded if a court cannot award specific performance because there is an absolute jurisdictional bar to it[9] or if there is an equitable discretionary defence[10] raised. As to the latter, statutory equitable damages may be awarded if specific performance might have been denied on discretionary grounds, however as with the former approach no damages will lie if there is a

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8. Boyns v Luckey (Supra) Approach.

9. Absolute jurisdictional bars to specific performance being; Illegality of the contract, Impossibility of performance; Frustration of the Contract; See Spry (Supra) @ 82 as to "Conclusive Defences as opposed to Discretionary Defences".

10. i.e. Hardship, Clean hands, Unfairness, Third parties, Mistake, Personal Services, Continuing Contracts.

conclusive jurisdictional bar.[11]

Buckley L.J. in Price v Strange[12] further adhered to the jurisdiction - discretion concept and put his support behind the modern trend when noting that "the court had at all relevant times jurisdiction to entertain a claim for specific performance of the contract between the parties, and consequently had at all relevant times a discretion under the section to award damages in addition to, or in substitution for, specific performance.[13]

Isaac's J in Goldsborough Mort & Co v Quinn[14] averts to this approach as an afterthought, the High Court of Australia holding that if the discretionary defence of mistake had been made out, this would have been an appropriate case to award damages under Lord Cairn's Act.

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11. Graham J in Watts v Spence [1975] 2 All ER 528 alluded to this distinction between jurisdictional and discretionary defences. The case was not a proper one for the decree of specific performance (jurisdiction) and, even if it had been, it would have been unreasonable to order it on the facts (discretion).

12. [1978] Ch 337 @ 345

13. Ibid per Buckley L.J. @ 510 "... It is clear that the Act gives no entitlement to damages; it confers a discretion on the Court to award damages. "

14. (1910) 10 CLR 674.

Cairn's L.J.[15] seems to have considered that the power to award damages conferred by the 1858 Act could be exercised if the plaintiff made out as at the commencement of the suit the ingredients of the case for equitable relief, notwithstanding that ultimately he failed to obtain relief on discretionary grounds. A passage from the judgment is worth noting[16] - "That, of course, means where there are, at least at the time of bill filed, all those ingredients which would enable the court, if it thought fit, to exercise its powers and decree specific performance - among other things where there is the subject matter whereon the decree of the Court can act - in a case of that kind, the Court has a discretionary power to award, under certain circumstances, damages in substitution for, or in addition to, the decree for specific performance. The object obviously was to allow Chancery to do complete justice, as it was called, a phrase which assumed that there was power in the Court of Chancery to make a decree to the whole extent which the case required".[17]

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15. Later Lord Cairns.

16. Ferguson v Wilson (1866) L R 2Ch 77

17. Subsequently in Sayers v Collyer (1884) 28 Ch D 103 it was held that even though the plaintiff's case for an injunction was defeated by acquiesence, nominal damages could still be awarded.

THE TIMING OF THE FIRST THRESHOLD QUESTION

At what time must a plaintiff seeking damages under Lord Cairn's Act demonstrate that the court has the requisite jurisdiction to award them? It would seem that the plaintiff is entitled to claim damages if at the time he instituted his suit for relief he could have obtained specific performance but his right to that relief has been lost to him in between the institution of the suit and the hearing.[1] For instance where the sale of which specific performance was sought was completed between institution of the suit and its hearing, as in Cory v Thames Ironworks and Shipping Co Ltd.[2] Equitable damages were awarded in this case.

If a plaintiff commences a suit at a time when he has no right to specific performance, he may still maintain the claim to the Court having jurisdiction if such a right had accrued to him before the hearing of the suit.

The latest authority on this point is Oakacre Ltd v Claire Cleaners Ltd.[3] In this case a block of flats was in issue. On the presumed settlement date the vendors failed to perform, so with great zeal, the purchaser's solicitors had a writ for specific performance filed on the same day. It was later found that settlement date was some four days later. The writ had been issued prematurely. Judge

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1. Gummow, Meagher & Lehane "Equity, Doctrines & Remedies 2nd Ed @ 2309.

2. (1863) 8 LT 237. Also Fritz v Hobson (1880) 14 Ch D 542

3. [1981] 3 W L R 761

Mervyn Davies held that within the framework of a specific performance action the Court may award damages for delay in completion despite the fact that the action was instituted before the contractual date of completion.[4]

The latter case is to be contrasted with The Millstream Pty Ltd v Shultz[5] where McLelland. J held that the Court has no power to award damages pursuant to Section 68(b) of the Supreme Court Act 1970[6], where at the time of the commencement of the proceedings, the right to specific performance was not present although it became available later.[7] This case is criticised in Australia's leading Equitable text book[8], and with respect to McLelland. J, the case does go heavily against previous authorities and with little substance to support it.

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4. Per Judge Mervyn Davies Supra n.3 @ 765.
   Also see on this point Phelps v Prothero (1855)7 De GM &G 722,
   Davenport v Rylands (1865) L R 1 Eq 302
   Bosaid v Andry [1963] V R 465
   Ferguson v Wilson (1866) LR 2 Ch 77

5. [1980] 1 NSWLR 547

6. The New South Wales Equivalent of Section 2 of Lord Cairn's Act.

7. In The Millstream Pty Ltd v Shultz a quantity of deer were not present at the date of the commencement of proceedings for specific performance at their sale, however they did become ascertainable at a later date.

8. Gummow, Meagher & Lehane "Equity, Doctrines & Remedies" 2nd Ed @ 2309 n. 7

If, because of an argument as to time, there is no jurisdiction to make an award under Lord Cairn's Act, it may be found to be appropriate to award damages under the inherent powers of the court. For example where a plaintiff is absolutely barred from obtaining specific performance on the grounds of laches or acquiesence.

B (2)(ii) THE SECOND THRESHOLD QUESTION

With regard to the second of the threshold questions there has appeared from time to time a tendency to formulate as a series of inflexible rules some general principles which are applied by the courts in determining whether they should use their discretion to award damages or otherwise.

The judgment of A.L. Smith. J in Shelfer v City of London Electric Light Co[1] is foremost in this quest for rigidity. His Honour stated that it was a "good working rule" that"(1) if the injury to the plaintiff's legal rights is small, (2) and is one which is capable of being estimated in money, (3) and is one which can be adequately compensated by a small money payment (4) and the case is one in which it would be oppressive to the defendant to grant an injunction : - then damages in substitution for an injunction should be given." This statement of principle has been criticised as unduly tending to confine the jurisdiction of the court.[2] The authors of "Equity Doctrines and Remedies"[3] go so far as to say that in cases where the court has an alternative in awarding specific performance or damages, it is probably safe to say that

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1. [1895] 1 Ch 287 pp 322 323

2. Lord Hanworth MR in Fisenden v Higgs and Hill Ltd (1935) 153 LT 128
Jolowicz (1975) CLJ 224. Spry "Equitable Remedies" 2nd Ed @ 558.

3. Gummow Meagher & Lehane 2nd Ed @ Para 2310.

specific relief ought always be awarded unless the court considers that in the particular circumstances of the case it is unreasonable to do so. Possibly the guidelines of A.L. Smith L.J. should be treated as relevant factors which are to be used to formulate a question as to the desirability of damages but which are not wholly determinative of the matter.

Before turning to an examination of the use of the discretion, it is necessary to differentiate between three distinct situations. In the first place, the circumstances of the case may dictate that equitable damages be awarded in substitution for specific relief. Secondly, because of the circumstances the discretion may be used to award damages in addition to specific performance. Finally it may appear that neither specific performance nor equitable damages should be awarded.

B(2)(ii)(a)

DAMAGES IN SUBSTITUTION FOR OR IN LIEU OF SPECIFIC RELIEF

As already noted the High Court of New Zealand has a jurisdiction to award both equitable and common law damages. Hence the power to award equitable damages becomes less significant, as a court may inter-change between its dual jurisdiction with freedom[1].

Spry is prepared to state a general principle as regards substitution ; "...substitution ordinarily occurs only when the hardship caused to the defendant through specific enforcement would so far outweigh the inconvenience caused to the plaintiff if specific enforcement is denied that it would be highly unreasonable in all the circumstances to do more than award damages".[2]

This "general rule" is to be read in light of the statement of the High Court of Australia in Norton v Angus[3], who expressly adopted the rule laid down by Selborne L.C. in Wilson v Northampton and Banbury Junction Railway Co[4], that being, that in a case in which the Court cannot satisfactorily do justice by means of a decree of specific performance and the best justice of which the case is

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1. In some instances particularly in the District Court it is to be queried whether the Court knows which of the two jurisdictions it is acting under, and even that there are two distinct forms of damages.

2. Spry "Equitable Remedies" 2nd Ed 558.

3. Norton v Angus (1926) 38 CLR 523

4. (1874) LR 9 Ch 279 @ 285.

capable can be done by giving damages, damages should be given in lieu of specific performance.

What matters have been considered relevant in persuading a court to exercise its discretion[5] and award damages in substitution? One such matter is the laches or acquiesence of the plaintiff. Depending on the delay involved and the hardship and prejudice inflicted upon the defendant the court may award damages in substitution. For example, if a delay of some ten months between a refusal to complete a settlement and the subsequent filing of a writ caused Quilliam. J to set aside a decree of specific performance due to laches in Hickey v Bruhns.[6] However His Honour, without stating any reasons, immediately progressed to awarding the plaintiff damages in substitution. Souster v Epsom Plumbing Ltd[7] provides a similar example of substitution, also in this case the court gave no reason why damages were awarded and additionally the reasons for the refusal of the decree were not reported. Further Cook. J had no hesitation in finding that a decree should not issue in Crofts v GUS Properties[8], as not only was there delay,

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5. Once again the discretion of the court is called into play, and hence all the relevant discretionary considerations must be canvassed by the court.

6. [1977] 2 NZLR 71

7. [1974] 2 NZLR 515

8. 1 NZCPR 332

but the plaintiffs had stood by and taken no action when the defendant commenced building upon the land in question. Cook. J moves from this observation directly to "accordingly the remedy must be in damages".[9] One may wonder whether this comment is with reference to common law or equitable damages. In short, only the trial judge can answer this question and he elected not to do so in his judgment. Herein lies one of the "advantages" of a fused Judicature Act system - not having to nominate. Moreover if the plaintiff has delayed in seeking relief or, if by his actions or representations, he has shown himself prepared, at a prior time, to accept damages, this tends to demonstrate that the substitution of damages for specific relief would not create too great a hardship to the plaintiff[10].

It must be remembered that it is the defendant who is ex hypothesi at fault and should not be for the plaintiff to accept unsought damages[10a] to apease a defendant. Therefore it is only if the

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9. 1 NZCPR 332 @ 341

10. Senior v Pawson (1866) L R 3 Eq 330

10a. Leeds Industrial v Slack [1924] AL 851 per Lord Sumner
" For my part I doubt ... whether it is complete justice to allow the big man, with his big building, and his enhanced rateable value, and his improvement to the neighbourhood to have his way, and to solace the little man for his dark and stuffy little house by giving him a cheque that he does not ask for".

granting of an order for specific performance "would inflict damage upon the defendant out of all proportion" to the relief which the plaintiff will thereby obtain, that damages will be awarded in substitution for specific performance.[11] Illustrative of this point is Eyre v Todd[12]. This early New Zealand case concerned a farmer who agreed to exchange his farm for some land in town. The farmer was not overly conversant with business matters and his grasp of plans and boundaries was even less well informed. Unfortunately the land in town which he had acquired had no street frontage, a factor on which he was reliant. Stout C.J. found that to decree specific performance would mean the loss of the defendant's farm and the defendant would be saddled with a mortgaged property which he had no use for. On the other hand, the only damage that the plaintiff had suffered was the commission he would have to pay to his agent, and the expenses he may have been put to because of the contract. Given this balance, The Chief Justice refused specific performance and granted damages in substitution.

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11. Sharp v Harrison [1922] 1 Ch 502 @ 515

12. [1917] GLR 225.

B(2)(ii)(b) NEITHER SPECIFIC PERFORMANCE NOR EQUITABLE DAMAGES

In some instances the court should refuse both damages and specific relief, as the grant of equitable damages is as much a discretionary matter as the grant of specific performance, and therefore the discretion to award damages is subject to the same equitable defences which may bar specific relief.[1]

If a decree is refused on the grounds that to compel performance would result in hardship, then nonetheless the plaintiff ordinarily retains his remedy at common law for damages. Therefore if the defendant is obliged to pay damages at law it is "no special hardship upon him to pay damages at equity".[2]

Assuming there is no personal bar to relief[3], damages will normally be awarded in these circumstances.[4]

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1. Discussed post pp 78ff.

2. Spry "Equitable Remedies" 2nd Ed @ 561

3. i.e. fraud, an absence of clean hands.

4. For Example Goldsborough Mort v Quinn (1910) 10 CLR 674. In this case the court refused a decree of specific performance on the ground that the defendant had entered into the contract under a mistake as to its meaning. Isaac's J observed that if specific performance had been refused on the ground of non-essential mistake damages should have been awarded. However in the case at hand the mistake was essential.
   Also : McKenna v Richey [1950] VLR 360

If the plaintiff is unable to do equity in that his action be tainted by fraud, non-disclosure, unfairness, lack of clean hands; and even where the plaintiff has a right to damages at law, there may nonetheless be also a refusal of equitable damages, since the view may be taken that the behaviour of the plaintiff has been unconscionable in such a way that it is unjust that he should be awarded, not simply specific performance, but also equitable damages. Hence if there is an over-reaching, or a taking advantage of a defendant, all equitable relief, including damages, will be refused. Illustrative of this point is Weily v Williams.[5] The defendant who was a widow and a paralytic entered into a contract with the plaintiff to purchase his hotel at a great overvalue. The defendant, being unable to make personal enquiries, was dependent for information upon what others had told her. There was, however, no evidence of misrepresentation or undue influence on the plaintiff's part. In a suit by the plaintiff for specific performance, the court, under the circumstances declined a decree for specific performance, but granted an inquiry as to damages. However the court noted that if undue influence had been found no form of relief would be granted.

Where considerations such as laches and equitable estoppel are present the exercise of the discretion depends upon the manner in which the stance of the defendant has been affected by the conduct in question.[6] In

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5. (1895) 16 L.R. (NSW) Eq 190

6. Soyers v Collyer (1884) 28 Ch D 103 per Fry J @ 110

" Acquiesence may either be an entire bar to all relief, or it may be a ground for inducing the court to act under the powers of Lord Cairn's Act. "

McKenna v Richey[7], for example, there was unreasonable delay on the part of McKenna, the plaintiff, with regard to the enforcing of an order for specific performance on the sale of a business. However the position of the defendant was worsened only in so far as the grant of specific relief against him was concerned, and hence there was no sufficient reason to refuse equitable damages.
However since a defendant's position may be worsened in so far as a subsequent grant of damages are concerned, it may be apposite to refuse equitable damages or else to allow them only subject to terms or conditions or a reduction in amount. Hence in Malhotra v Choudhury[8], as there had been a delay by the plaintiff Doctor for almost two years in bringing the proceedings to a conclusion, the date for valuing the property for the purpose of awarding damages was moved back one year from the date of judgment.[9]

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7. [1950] VLR 360.

8. [1979] 1 All ER 186.

9. See also Hickey v Bruhns [1977] 2 NZLR 71 ; Crofts v GUS Properties [1982] 1 NZCPR 332

B(2)(ii)(c) DAMAGES IN ADDITION TO SPECIFIC RELIEF

Damages will not be granted in such a manner as to give rise to double relief, that is an order will not be made which both requires specific performance of an obligation and also avoids damages in respect of non-performance[10]. But, in certain circumstances a plaintiff may be entitled to damages for breach of contract as well as to an order for specific relief. An agreement may be specifically enforced in part, leaving the plaintiff to his claim for damages for breach of the remainder.[11]

Damages may be awarded for delay in completion. In Easton v Brown[12] a defendant contracted to sell a house and land with vacant possession. To summarise matters, specific performance was ordered but the plaintiff stayed enforcing the order as the wife of the defendant and her nine children remained in the house. It was found that the plaintiff's required the house for a development scheme. The defendant applied to have the order for specific performance set aside on the ground that it had not been exercised for an inordinately long period of time. Goulding. J sitting in the Chancery Division held that the order for specific performance would stand and there

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10. Johnson v Agnew [1979] 2 WLR 487

11. Soames v Edge (1860) John 669,
London Corporation v Southgate (1868) 17 WR 197.
Cooper v Morgan [1909] 1Ch 261.
Griffin v Mercantile Bank (1890) 11 LR (NSW) Eq 231

12. [1981] 3 A 11 ER 278

would also be an inquiry as to damages because of the defendant's delay in completing the contract[13].

The power to award damages in addition is clearly of much assistance in cases where specific performance is sought of a contract which contains some provisions in respect of which no decree could be made[13a]. If such "illegal" or inequitable provisions of the contract have been performed at the time relief is sought, or if such terms have been waived, damages will lie under Lord Cairn's Act even though no court of equity would have decreed specific performance of the contract in toto[14].

It has been held to be possible for a court to decree specific enforcement of a contract in so far as the provisions of an agreement are not objectionable and to award damages under the Act in respect of the remainder of the agreement.[15] Difficulties

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13. Ford Hunt v Raghbir Singh [1973] 2 A 11 ER 700 applied. Also see Raineri v Miles (Wiejski, Third Party) [1980] 2 A 11 ER 145 ; Jones v Gardner [1962] 1 CL 191; Phillips v Lamdin [1949]2 KB 33; Jacques v Millar (1877) 6 Ch D 153.

13a. As to this generally see Spry "Equitable Remedies" 2nd Ed PP 100 - 104.

14. Spry "Equitable Remedies" 2nd Ed 548 - 9. Norris v Jackson (1860) 1 J & H 319; London Corporation v Southgate (1868) 17 WR 197.

15. See cases in footnote 11 supra, and add Middleton v Greenwood (1864) 2 De GJ & S 142; Key v Johnson (1864) 2 H & H 118; Wright v Carter (1923) 23 SR (NSW) 555. Compare Ryan v Mutual Tontine Westminister [1893] 1 Ch 116.

arise if it is accepted that a grant of equitable damages will only be awarded if a plaintiff could have obtained a decree for specific performance[16], because it on agreement is not susceptible of specific performance because some of its provisions are void no damages will lie. However the underlying assumption behind this argument has, it is submitted, been put to rest.[17]

It is to be stressed that these difficulties will not arise as prevalently in New Zealand because there are Judicature Act provisions in force, for the Jurisdiction of the court to award legal damages is not limited in the same way as under Lord Cairn's Act provisions.

A further consideration as to damages in addition to specific relief arose from the judgment of Goff. J in Grant v Dawkins[18]. His Honour felt that where a court of equity awards damages under Lord Cairn's Act in addition to decreeing specific performance, the amount of damages can never exceed the difference between the purchase price payable under the contract and the value of the property at the date of the decree. It is argued[19] that this principle will lead to injustice. For example assume a property has a contract price of $5,000, and assume the value of the property at the time of the decree is $6,000. Further, assume the purchaser has to pay off mortgages amounting to $4,000. By reason of Goff. J's

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16. See Supra: 31ff

17. See Supra: 31ff

18. [1973] 3 A 11 ER 897.

19. Pettit (1974) 90 CQR 297 - 301.

argument the purchaser could obtain no more than $1,000 in damages. Provided this decision is not overturned, the inherent jurisdiction of equity to award damages may be pressed into action in this instance, to alleviate any hardship created by such fact situations, though they may be unusual[20].

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20. Note compensation may be awarded along with specific performance in certain instances.

B (3) SIGNIFICANCE OF EQUITABLE DAMAGES

Although Lord Cairn's Act has a limited procedural purpose[1], it would seem that its actual effect was to create a novel jurisdiction to award damages in some situations where the common law was powerless. Notwithstanding that New Zealand is subject to a Judicature Act System, there is still a need today to discriminate between equitable and common law damages. First, damages may be awarded under the equitable jurisdiction in respect of purely prospective loss[1a]. No common law court could award damages for such threatened or apprehended injury yet it was decided in Leeds Industrial Co-operative Society Ltd v Slack[2] that such damages were admissible under Lord Cairn's Act. There seems to be no reason in principle why equitable damages should not be awarded in substitution for a decree of specific performance where, as yet, there has only been an anticipatory breach of contract.[3]

Secondly, equitable damages may be ordered where, in the circumstances of the case, the plaintiff has no cause of action at law.[4] For instance where a contract is rendered unenforceable

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1. Horsler v Zorro [1975] Ch 302.

1a. In substitution for a quia timet injunction
Hooper v Rogers [1975] Ch 43.

2. [1924] AC 85.

3. See Hasham v Zenab [1960] AC 316 ;
Wroth v Tyler [1974] Ch 30, 60.

4. Wroth v Tyler [1974] Ch 30, 59 per McGarry J ;
Price v Strange [1977] 3 WLR 943 957 per Goff. J ;
Johnson v Agnew [1979] 1 A 11 ER 883 895 per Lord Wilberforce.

by non-compliance with the Statute of Frauds[5], but which has been sufficiently part performed by the plaintiff so as to support an award of damages in lieu of specific performance.[6] Thirdly, before the decision in Johnson v Agnew[7] it was thought possible, even where a Judicature Act system operated, that the measure of damages in equity may be greater than that at law. This was emphasised by McGarry J. in Wroth v Tyler[8] as such ;

"...damages assessed under [Lord Cairn's Act] are to be ascertained in accordance with that Act on a basis which is not identical with that of the common law ". Such a distinction is fueled by the notion that the measure of discretionary damages under the Act may have been more favourable to the successful plaintiff in a period of high inflation than that which the common law provided him as of right. However this is not now the case as was conclusively proved by Johnson v Agnew, where it was held that there was little or no difference between the assessment of damages at common law and equity.[9]

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5. Contracts Enforcement Act 1956 in New Zealand.

6. Domb v Isoz [1980] 1 A 11 ER 942; The Deputy Judge dismissed the action for specific performance on the ground that there was no concluded contract. Damages were awarded in substitution by the English Court of Appeal. See also Lavery v Pursell (1888) 39 Ch 508 ; J.C. Williamson Ltd v Lukey and Mulholland (1931) 45 CLR 282.

7. Supra n.4

8. Supra n.4 @ 57.

9. Ferguson v Wilson (1866) L R Ch App 77
Malhotrg v Choudhury [1978] 3, WLR 1406.

Lord Wilberforce noted that the jurisdiction to award damages in lieu of specific performance was wider than that at common law. With respect such an observation is closely supported by the foregoing discussion.

To aid further study of Johnson v Agnew the facts of that case were in brief, that the plaintiff, vendors of land, after failure by the purchaser to complete and a notice making time of the essence, obtained an order for specific performance with which the purchaser failed to comply and which thereafter became unenforceable because the vendors' mortgagees exercised their sale of state; the question was whether the vendors (held not to be at fault) could seek damages and if so, at what date these should be assessed.

B (4) THE QUANTUM OF DAMAGES

A distinction may exist between the quantum of damages awarded at common-law and under the Act, because damages under Lord Cairn's Act are to be assessed at a different time from those at common law. In Bosaid v Andry[1] Sholl. J held that both at common law and under Lord Cairn's Act damages were awarded "at the time when the contract goes or is deemed to be gone".[2] Such is the beginning of the modern law concerned with the quantum of damages. By virtue of the reasoning of Sholl. J, where a plaintiff has been insisting on the continuance of the contract up to the date of actual decree of the specific performance action[3], the contract will come to an end by the act of the court refusing specific performance, and thereby impliedly declaring that the contract is no longer enforceable and hence at an end. The plaintiff is not required to take any further action to determine the contract. Thus damages in both instances would be assessed at the time the contract was

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1. [1963] V R 465.

2. Supra n.1 @ 490.

3. Assuming that the plaintiff has not elected to determine the contract for breach and seek redress at common-law.

at an end[3a]. The termination of the contract could occur at different times given different circumstances, therefore quantum might vary. It appears to have been accepted in Wroth v Tyler[4] that the normal rule is that general common law damages to which a purchaser is entitled for breach of a contract for the sale of land are measured by the difference between the contract price and the market value of the property at the date of breach, normally the date fixed for completion. McGarry, J continued and noted that the jurisdiction conferred by Lord Cairn's Act required the court to assess damages as the difference between the market value at the date of the contract and the date of the hearing. In the above case, a cottage was subject to a contract for sale for the price of £6,000. At the date on which the vendor breached by refusing to settle, the market value of the cottage was £7,500. At the date of the hearing its market value was £11,500. By applying the "general damages rule" £1,500 would have been payable. However McGarry, J awarded £5,500

3a. Submitted that the approach taken by Sholl J. cannot be countenanced unless one accepts the proposition that common law (and hence equitable damages) must be assessable as at the date of the plaintiff's acceptance of the defendant's breach, not necessarily as at the date of the initial breach. An alternative approach would be to argue that damages are measured as at the date of breach only the defendant is in breach. And if the plaintiff terminates the contract he should be required to mitigate his loss by going forthwith into the market to find another vendor.

4. [1974] Ch 30.

stating that the Act required the damages to be a "true substitute" for the land which would have been the subject of the decree for specific enforcement, and hence the value of the substitute had to be assessed at the date of the hearing.

In short Wroth v Tyler alludes to the proposition that on the statutory wording of the Act, equitable damages afford a different measure than those at common-law[5]. Possibly it was this schism that lead to the recent revival of interest in equitable damages, as it was seen that the measure of damages under the Act may have been more favourable to the successful plaintiff in periods of high inflation than those at common law provided.[6]

The reasoning of both McGarry, J. and Sholl, J may produce the same results, but it must be understood that they base their theories on different grounds. McGarry, J stresses that damages are a substitute for specific performance and as such this assumes the contract is still on foot. On the other hand Sholl, J treats the jurisdiction under the Act to award damages as only arising when the contract is determined.

In reaching his conclusion McGarry, J applied the equitable maxim that "Equity follows the Law".[7] Hence equity would normally apply

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5. Wroth v Tyler per McGarry J @ 56
" ... damages assessed under Lord Cairn's Act are to be ascertained in accordance with the Act on the basis which is not identical to that of common law..."

6. Supra n.5 per McGarry J @ 55.

7. Generally see Meagher, Gummow & Lehane "Equity Doctrines and Remedies" 2nd Ed 62 - 64.

the common law rules for assessing the quantum of damages. But this maxim was subject to the overbearing statutory requirement that damages shall be in substitution for specific relief.

It is ventured that McGarry's judgment should be read subject to the following. First, that a court has no jurisdiction to decree specific performance, and accordingly cannot apply Lord Cairn's Act, unless damages are an inadequate remedy.[8] Since an inadequate remedy cannot literally be a true substitute for an adequate remedy, it would appear that McGarry J's principle would need to be broadened somewhat. Possibly it could provide for the court to award the closest possibly money substitute for specific performance rather than a true substitute.

The undue rigidity of McGarry J's test is further highlighted by the inference that Lord Cairn's Act should not be read as imposing a statutory requirement that the damages awarded be a true or close substitute for specific relief. The section rendered it "lawful" for the court, "if it shall think fit", to award damages, and provided that "such damages may be assessed in a manner as the court shall direct". It is submitted that these words suggest that the Legislature did not intend to impose a statutory directive as to the measure of

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8. " The Court gives specific performance instead of damages only when it can by that means do more perfect and complete justice".

Per Lord Selbourne L.C. in Wilson v Northampton and Banbury Junction Pty Ltd (1874) 9 Ch App 279, 284 ;

Flint v Brandon (1803) 18 Ves 159.

damages. To interpret the section as imposing such a direction would be unduly fettering the courts discretion.

Some months after the delivery of the judgment in Wroth v Tyler, Goff. J in Grant v Dawkins[9] attempted to apply the reasoning of the earlier case. In the latter case the defendant agreed to sell free from encumbrances a house. However this house was subject to two mortgages, which secured sums exceeded in aggregate the purchase price. The plaintiff obtained specific performance for the conveyance of the property subject to the mortgages. In addition the purchase price was extinguished as compensation for the liability assumed with the mortgages and damages from the defendant in respect of the amount by which the moneys secured exceeded the purchase price, but so as not to be greater than the difference between the value of the property, and the purchase price.

Goff. J cited Wroth v Tyler and pointed out that the case concerned damages in substitution for specific performance. His Honour felt it would be "quite illogical" to allow the plaintiff damages on a more limited scale simply because the court was awarding them in addition to, rather than in substitution for specific relief. Hence Goff. J valued the property at the date for completion, rather than the date of breach, thus giving the plaintiff the benefit of the appreciation in value between those dates. With respect, the reasoning of Goff. J must be called into question. In Grant v Dawkins because damages were awarded in addition to specific performance there was no over-riding statutory criteria, as was the cornerstone

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9. [1973] 3 A 11 ER 897

for McGarry's reasoning in Wroth v Tyler. Therefore even given Wroth v Tyler is correct in principle, the reasoning in Grant v Dawkins could not be sustained, as McGarry J acknowledged that the only reason that equity departed from the common law on the assessment of damages was the statutory necessity for the damages to be a "true substitute".

Oliver. J was the next reported English Judge to consider the law in this area, in Radford v De Froberville[10]. In this case it was held that damages were measurable as at the date of hearing rather than at the date of the defendant's breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date. It is submitted that this approach was the foundation for the later case of Johnson v Agnew[11], which confirmed that common law damages and equitable damages were to be assessed in the same manner. Murmurs of what was to appear in Johnson v Agnew were felt in Malhotra v Choudhury[12]. Counsel for the defendant argued that if damages in substitution were assessed at the date of judgment, then in periods of inflation, equitable damages would be higher than damages that were attainable at common-law. He went on to say that equity should have regard to the common-law rules when fixing a date for the assessment. However Cumming Bruce L.J would have none of this and stated that he was satisfied that equity was following the law by awarding damages assessed at the date of judgment and not the date of breach, because of the principles surrounding the common-law remedy of specific restitution in detinue.

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10. [1977] 1 WLR 1262

11. [1980] Ac 367

12. [1979] 1 A 11 ER 186

His Lordship followed Wroth v Tyler, but assessed the damages as at one year from the date of judgment, to take account of the plaintiff's delay.

McMullin. J opens the New Zealand consideration of the quantum question with the following remark ; " in times of stability in land prices such a point would not have been likely to arise for consideration"[13]. In this case the purchaser had entered into an agreement to purchase a property from the vendor. The vendor purported to rescind the contract on the ground that the plaintiff had failed to settle on the date on which time became of the essence. The sale price was to be $53,000. The vendor claimed that after the rescission approximately $15,000 was spent on the property by way of further improvements. Having carried these improvements out the vendor once again placed the property on the market, but this time for a price of $120,000. It was found at the initial hearing that there would have been a substantial increase in the value of the property between the date fixed for settlement and the date on which an order for an inquiry into damages was made. It had been the purchaser that had sought the decree of specific performance in light of the vendor's purported repudiation.

In holding that the damages in lieu of specific performance were to be assessed at the date of the order for the inquiry as to damages, McMullin. J dealt at length with Wroth v Tyler[14a] and

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13. Souster v Epsom Plumbing Ltd [1974] 2 NZLR 515 @ 521.

14a. Supra n. 4

Bosaid v Andry[14b]. His Honour felt that where a plaintiff seeks a decree of specific performance he is approbating the contract and seeking damages as an alternative remedy. Therefore with consistency such a plaintiff is entitled to maintain at the hearing of the action that the contract is still on foot (and it remains on foot until the court refuses specific performance). Hence McMullin. J considered that if damages are to be regarded as damages for the loss of bargain, brought to an end by the action of the court in refusing specific performance, there is only one time at which they should be determined, and that is when the bargain for which they are intended as compensation is brought to an end.

A variation of this theme occurred in a subsequent New Zealand Supreme Court case, Hickey v Bruhns.[14c] In this instance the purchaser sought specific performance of an agreement bearing the date October 1972. The purchase price was $3,500 payable as to $1,000 on the signing of the agreement and the balance in October of 1974. The purchaser did not settle on this date, but offered to settle at a later date after time had been made of the essence. The purchaser was refused his decree of specific performance by reason of laches, however the vendor was ordered to pay $4,900 damages by Quilliam. J.

His Honour examined the rule enunciated by McMullin. J in Souster v Epsom Plumbing Ltd[14d] and reasoned that if it applied to the

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14b. Supra n. 1

14c. [1977] 2 NZLR 71

14d. Supra n. 13

present case the measure of damages must be $6,500, which price is the difference between the contract price of $3,500 and the value of the land at the date of the hearing. Quilliam. J then proceeded to distinguish the case at hand from Souster's case and Wroth v Tyler saying that the reasoning of McMullin. J is not to be faulted, but that in the present case His Honour was faced with inordinate delay in a time of sharp inflationary increases. After fully considering Souster's case Quilliam. J touches on a matter which was to be emphasised some two years later by the House of Lords in Johnson v Agnew[14e], that is, damages represent an attempt to adhere to the general principle that a party sustaining a loss by reason of breach of contract is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. By applying the principles set out in Souster v Epsom Plumbing Ltd and Wroth v Tyler, His Honour reasoned that the longer the plaintiff delayed the greater his damages. This was not to be countenanced. However, His Honour did not go so far as to formulate a new approach. He simply assessed the damages upon the principle in Souster's case, but

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14e. [1979] 2 WLR 487

diminished them by an appropriate amount to allow for the plaintiff's delay.[15]

Prior to Johnson v Agnew, the question of quantum in Australia came before Needham. J in ASA Constructions Pty Ltd v Iwanor.[16] His Honour, whilst conceding the general correctness of Wroth v Tyler, departed from it in the particular circumstances of that case and awarded damages as at the date of breach.

Wroth v Tyler was to remain the law for seven years. Its tenure was halted by the decision of the House of Lords in Johnson v Agnew.[17] In that case the general principle established is that the innocent party is entitled to be placed so far as money can do so, in the same position as if the contract had been performed. Hence there was no difference, either in terms of the basis of assessment or in terms of the date of assessment, between the measure of damages at common law and equity. Lord wilberforce, with whose opinion all the other Law Lords agreed, was adamant that there was no warrant for a court to award equitable damages any differently from common law damages.

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15. See Also Grocott v Ayson [1975] 2 NZLR 586 Damages in lieu of an injunction. Held by Cooke. J that the measure of damages is to cover the area which would have been covered by an order for specific performance, and in assessing damages in lieu of a quia timet injunction for apprehended harm a somewhat similar principle may be invoked.

16. [1975] 1 NSWLR 512.

17. Supra n. 14e.

As a matter of general contract law the general principle applicable to the basis of the assessment of damages is the "reinstatement principle".[18]

There is a strong argument in favour of the view that damages under Lord Cairn's Act should be assessed in accordance with the reinstatement principle. That is a sum should be awarded as would enable the plaintiff to achieve exactly what was promised to be done by the defendant. The argument is as such; that an award of damages representing the cost of performing that which the defendant had promised to perform would seem to correspond most accurately with the formulation of Section 2 of the Act - that equitable damages are awarded "in substitution for". Nevertheless, despite the desireability of the statutory goal, it does not follow inexorably that an award of damages under the Act will produce a result different from that at Common Law.[18a] Indeed in Radford v De Froberville,[19]

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18. i.e. damages are compensatory and intended to put the plaintiff in as good a position as if the contract had been performed.

18a. "In cases where a breach of contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by default) the contract is lost. "

per Lord Wilberforce Johnson v Agnew [1979] 1 A 11 ER 883 @ 896

19. [1978] 1 A 11 ER 33

Oliver. J said he saw "nothing particularly alarming" in the proposition that there may be cases in which damages under the Act and damages at common law were the same. Lord Wilberforce[20] commented favourably on McGarry. J's[21] notion that the "breach date" rule was only a general rule and was not inflexible.[22] His Lordship went on to hold that, since the general principle of damages is compensatory, the court is not bound to adhere to the date of breach where that may lead to injustice. This reasoning disposes of the problem of linking obedience to Section 2 of the Act with the general principle that equity follows the law, by showing that in an appropriate case damages at common law can be aasessed at a date later than the breach.

Inter Alia Johnson v Agnew asserted that (i) damages at common law should be assessed at the date of judgment ; (ii) that damages should be assessed (presumably both at common law and in equity) not at the date of breach but at the date "the contract is lost". The judgment of the House of Lords, while stating that Wroth v Tyler was incorrect in holding that there was a difference between law and equity as to the dates on which damages should be assessed, makes no attempt to explain why this reasoning is wrong. A second criticism of the judgment is that proposition (i) above is hardly

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20. [1979] 1 A 11 ER 883 @ 896.

21. Wroth v Tyler Supra @

22. McGarry. J also made this comment in Horsler v Zorro [1975] Ch 302.

consistent with proposition (ii).[23] Hence a plaintiff seeking common law damages for a breach of a contract of sale consisting of a failure to deliver the property sold has presumably "lost"[23a] his contract before the institution of litigation, and should therefore have damages assessed at a date earlier than judgment. In this case the two propositions yield entirely different results.[24]

It is ventured that Johnson v Agnew marks a major step in the evolution of equity.

It is submitted that it is the singularly most important case decided with regard to specific performance since Leeds Industrial v Slack.[24(a)] Not only does the case examine the quantum of damages but also the availability of damages and the timing of the award.[24(b)] It is ventured that the evolutionary process is marked by a series of peaks and troughs. That is, a simple principle is developed which is ideally to be exercised according to the facts of each case before a court. However over a period of time the case law builds upon the principle and eventually covers it from sight completely. Such is the case with specific performance. During

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23. Gummow Meagher & Lehane "Equity Doctrines & Remedies" 2nd Ed @ 2313.

23a. Possibly this concept of loss may include cancellation under the Contractual Remedies Act 1979.

24. Moreover, in equity, at least in those cases where the plaintiff persists until judgment in his request for specific performance, the contract is not "lost" until specific performance is denied him.

24(a) [1924] AC 851.

24(b) Also there is an authoritative discussion on rescission.

the eighteenth century the Chancellors developed the fundamental rules which relate to specific performance. These principles, as with all matters equitable, were to be administered according to the courts conscience. Two hundred years on and notions of fairness and justice while still being averted to have been "straightjacketed" by volumes of case law attempting to set precedents for all conceivable situations. The House of Lords in Johnson v Agnew has clarified, developed and yet simplified the law in this area by stripping back the veneer that has been glossing the long established ethics of this remedy.

The New Zealand position has been reviewed by Cook. J who has given the most recent opinion on the time of assessing damage in Crofts and Matsas v GUS Properties.[25] Here the plaintiffs agreed to sell their land for $21,000 and also receive a comparable piece of land worth $1,000. Two contracts were drawn up. Settlement of the $21,000 contract was carried out promptly. The plaintiffs made other arrangements as to the purchase of the land. The defendant treated this as a breach of contract. After further delays the plaintiffs sued for specific performance and damages.

Cook. J first cites Lord Wilberforce in Johnson v Agnew, where His Lordship concluded that Lord Cairn's Act is not a warrant for the court to award damages differently from common law damages and His Lordship expressly says that the question as to the date of awarding

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25. 1 NZCPR [1982] 332

such damages is left open. Not surprisingly, Cook. J then proceeds to say that if there had been no delay on the part of the plaintiffs, the date in question would have been the date at which specific performance was refused, that is the date of the hearing. By pointing to the delay aspect Cook. J was able to follow Hickey v Bruhns[25a] and so brought forward the date at which damages should be assessed by three years because of the delay in commencing proceedings.

In Australia the most recent commentary on the situation is undertaken by Helsham C.J. in the Equity Division of the New South Wales Supreme Court.[26] His Honour reached the conclusion that the court could fix the date for assessment of damages as at any date that may be appropriate in the circumstances, including the date when the contract is lost. In this case the contract was lost at the date of Helsham C.J's initial judgment (this present case being an enquiry as to damages). Damages at that date amounted to the difference between the purchase price of $33,500 and the value of the property at the date of judgment - $55,000. His Honour then went on to express some strong views on the principle ; "In my view the law in this area is in such a mess that it is time that some court gave an authoritative decision".[27] In his opinion there is no date which can be said to be the date at which damages should be assessed. They should be assessed so as to do that which is just as between the parties in the particular circumstances of each case.

25a. [1972] 2 NZLR 71

26. Madden v Kevereski (1983) 1 NSWLR 305

27. Supra n. 26 @ 306.

Helsham C.J. also averted to the problem created by the inflationary nature of the property market. The learned judge followed the House of Lords in Johnson v Agnew to the effect that the appropriate date for assessment, provided that the innocent plaintiff has reasonably continued to endeavour to have the contract completed, is not the date of breach, but the date when the contract is lost. As to His Honour's reasoning, with regard to the concept of justice and the particular circumstances of the case, it gives effect to the word "may" in the phrase "the court may award damages" in Section 68. This is consonant with the rationale adopted by Sholl. J in Bosaid v Andry.[28]

It is submitted that this case continues the discretionary nature of the judgment of Lord Wilberforce. It is ventured that, as to the ascertaining of the correct time to assess, the principles are returning to a form in keeping with the established ideas of the Court of Chancery. A court is once again being asked to look at the general fairness or justice of the situation, an appeal is being made to the conscience of the court. As with many areas of the law a general discretion has been created to facilitate this pursuit of fairness. No doubt in time this discretion will be regimented by cases decided under it and these cases will in turn provide more unmanageable rules which will in turn be cast aside in favour of new discretions.[29]

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28. [1963] VR 465

29. The Millstream v Shultz (1980) 1 NSWLR 547 McLelland. J followed Johnson v Agnew, noting that the circumstances of the case could determine the date of assessment.

Subsequent to Johnson v Agnew the question as to the date of assessment of damages has only been seriously considered by a court of higher jurisdiction on one occasion, that being in Domb v Isoz[30] by the English Court of Appeal. In this case their Lordships followed the principles expounded by Johnson v Agnew. In the former case a judge at first instance dismissed an application for specific performance of a contract to buy a house. The purchasers appealed. Between the date of the trial and the hearing of the appeal they bought another house and at the hearing of the appeal elected to claim damages in lieu of specific performance. Hence by applying the principles in Johnson v Agnew the date at which the damages should be assessed was held to be the day on which the plaintiffs elected to pursue the remedy of damages. Buckley L.J supported this view by explaining that the fact that between trial and the hearing of the appeal another house was bought, does not mean that at the date of that purchase they elected to abandon their right to specific performance. The plaintiffs could still have insisted on performance of the contract, this would merely mean that they would own two houses.

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30. [1980] 1 A 11 ER 942.

B(4)(i)

SECTION 9 DAMAGES UNDER THE CONTRACTUAL REMEDIES ACT 1979

After "cancellation",[1] a court can in its discretion "subject to Section 6 of this Act, direct any party to the proceedings to pay to any other such party such sum as the court thinks just".[2] As Section 9 (2)(b) is expressed to be subject to Section 6, a party who has been induced to enter into a contract by misrepresentation may still secure damages. Such proviso is further reinforced by Section 10 of the Act which also preserves the right to recover damages.[3] While this distinction between Section 9 "just sums" and Section 6 damages is of interest, for the purposes of this paper one must consider whether the "just sums" equate to or derigate from equitable damages. For instance, if a decree is refused due to the failure of the contract being brought about by cancellation under the Contractual Remedies Act ; a court would appear to have a power to award a just sum after cancellation (Section 9) ; however because the contract is fundamentally at an end Lord Cairn's Act damages may not be awarded in substitution for the failure of the contract and hence the failure of the plaintiffs' specific performance action. Herein lies the difference between the two forms of monetary relief.

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(1) Sections 7 and 8 of The Contractual Remedies Act 1979 provided for the cancellation of contractual obligations.

(2) Section 10 Contractual Remedies Act 1979.

(3) Section 10 Contractual Remedies Act 1979.

The "just sums" may be awarded where a court lacks the primary jurisdiction to award damages in equity. However it is to be noted that in fixing such "just sums" the court is required to have regard to a number of factors including inter alia "such matters as it thinks proper"[4] and any order may be made by the court according to the terms "that it thinks fit".[5] Therefore, it is submitted that the awarding of "just sums", as with other relief provided for in the various contractual statutes, is a matter of conscience. It will only cease to be so, when the vaguaries of law reporting submerge the initial statutory intention.

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(4) Section 9 (4)(f)

(5) Section 9 (2)(c)

C SPECIFIC PERFORMANCE WITH COMPENSATION

Where the land which is the subject-matter of the contract differs from the description of that land in the contract itself, the purchaser is entitled to be compensated by the vendor even in the absence from the agreement of a compensation clause.[1] At common-law any difference, however trivial, between the land described in the contract and the land conveyed, constituted a defect which enabled the purchaser to rescind. When there was only a slight defect, the Courts of Equity interfered, and to ameliorate hardship, granted specific performance with compensation. The Common Law principle is based on the idea that a purchaser cannot be forced to take a property which is substantially different from its description in the contract, and permeates the whole area of the law relating to compensation and amounts to a fundamental principle (The rule in Flight v Booth[2]).

The right to compensation is confined to errors, misdescriptions and the like in the contract itself. A purchaser cannot claim compensation with specific performance for breach of any collateral contract or representation which is not a terms of the sale and purchase agreement.[3] However the distinction is no longer of great

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1. As to compensation clauses see post. P75ff

2. (1834) 1 Bing N.C. 370.

3. Rutherford v Acton-Adams [1915] AC 866

significance now that the Contractual Remedies Act 1979[4] allows an action for damages for innocent misrepresentation regardless of whether the representation constituted a term of the contract or not. So where the purchaser cannot claim compensation he may be able to obtain damages. However he cannot have both.[4a]
The equitable jurisdiction to grant a purchaser specific performance with compensation is based upon estoppel. For this reason the purchaser cannot succeed if he knew the true state of the title[4b] or subject matter when he signed the contract, or if he knew then that the vendor entered into the contract in ignorance of the true facts.[5] It is different where the purchasers claim is based upon a clause in the agreement, for then no question of estoppel arises.

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4. Section 6 of the Contractual Remedies Act 1979.

4a. Smith v Young. [1941] NZLR 147

4b. Where a purchaser knowing of a defect acts in a manner implying a waiver of his right to compensation for that defect, the vendor may insist on completion of the purchase without compensation :
Burnell v Brown 1 Jac & W 168.

5. Rudd v Lascelles [1900] 1CL 815.

With regard to compensation, a number of questions arise. Is there a distinction between specific performance with compensation and specific performance with damages in addition? Moreover is equitable compensation just another form of damages granted under the inherent jurisdiction of a court of equity? Finally, what is equitable compensation? Where a vendor is able to perform the contract in its substance, but unable to perform it literally in all parts, he may yet sue the purchaser for its specific performance. On the other hand, where a vendor has not substantially all that he has contracted to sell, he cannot sue for specific performance, but the purchaser may generally insist on taking what the vendor has.

From these principles arises a right in the purchaser to compensation in respect of the difference between the thing which the vendor insists that he shall take, or he himself insists on taking, and the expressed subject-matter of the contract.

Spry[6] notes that the purchaser's right to specific performance with compensation is only in respect of deficiency in the subject-matter described in the contract and does not apply to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it.[6a]

Viscount Haldane in Rutherford v Acton Adams[7], an appeal from the New Zealand Court of Appeal, deals at length with the respective

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6. Spry "Equitable Remedies" 2nd Ed. 274ff

6a. Nor will compensation be awarded for non-disclosure of something which is not an encumbrance on the title ; Greenhalgh v Brindley [1901] 2 Ch 324.

7. [1915] A C 866.

rights of the vendor and purchaser to specific performance and compensation. His Lordship begins by stating that in exercising its jurisdiction over specific performance a Court of Equity looks at the substance rather than the letter of the contract. Hence, if a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. His Lordship then averted to another situation ; that is where a vendor claims specific performance and where the court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser that is suing the court holds him to have an even larger right. But his right applies only to a deficiency in the subject-matter described in the contract.

Such principles were confirmed by the Supreme Court of Western Australia in Willison v Van Ryswyk.[8] Upon a sale of a suburban business the vendor guaranteed that the said business had shown a net profit of 50 per week. The net weekly profit was in fact 49 1s 4d. The purchaser refused to complete because of the discrepancy. The vendor, in a suit for specific performance of the contract, neither alleged nor claimed damages in lieu. The trial judge held that the vendor had not breached the contract,

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8. [1961] W A R 87

but on other grounds, declined to give a decree, but in lieu thereof awarded damages of £485.

It was held by the Supreme Court that in exercising its discretion to decree specific performance with compensation it considers the substance and intent rather than the form of the contract, and will decree specific performance with compensation for any small and immaterial deficiency provided that the vendor has not otherwise disentitled himself from the remedy and provided that the difference in value can be fairly computed. In this case the deficiency was not such as to preclude this rule and the difference in value could be fairly computed.

To put the entire matter simply, where a misdescription is insignificant, so that the purchaser gets substantially though not precisely what he bargained for, the court will enforce the contract even at the suit of the vendor, compelling him to make compensation to the purchaser.

The court will not apply this principle at the suit of either party if the proper amount of compensation cannot be fairly ascertained.[9]

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9. Lord Brooker v Rounthwaite (1846) 5 Hare 298. where the amount of timber to be included in the sale was not defined by the contract; Rudd v Lascelles [1900] 1 CL 815 compensation for restrictive covenants held to be incapable of assessment; Also Halkett v Lord Dudley [1907] 1 Ch 590.

Moreover where a material part of the subject matter of the contract is wanting and hence leads third persons having their rights prejudiced to the property in question, the same will apply.[9a] Many contracts for the sale of land commonly contain a condition to the effect that the lots are believed to be correctly described, but that errors shall not annul the contract and that no compensation shall be paid for or in respect of any misdescription. Notwithstanding such a condition, the purchaser may repudiate the contract if the misdescription is fraudulent or is of such a material nature that it induced the purchaser to enter the contract.[10] But, more importantly from this paper's point of view, such a clause prevents the purchaser from obtaining specific performance with compensation.[11]

9a. Peers v Lambert (1844) 7 Beau 546; Shackleton v Sutcliffe (1847) 1 De G & Sm 609.
Lipmans Wallpaper Ltd v Mason and Hodghton [1969] 1 Ch 20

10. Whittemore v Whittemore (1869) LR 8 Eq 603;
Watson v Burton [1956] 3 All ER 929.

11. Note: In earlier times conditions providing for compensation in contracts were the norm. The reverse now appears to be the standard. See generally Halsbury's "Laws of England" 4th Ed Vol. 42 Para 117.

Specific performance with compensation will not be granted if it will work great hardship upon the vendor; conversly, a vendor cannot invoke the rule in Flight v Booth by arguing that the misdescription is so substantial that he cannot be required to convey the property and allow compensation to the purchaser.[12] In an open contract, the purchaser cannot claim compensation after he has settled the purchase, unless he actually obtains the vendors agreement that he settles with reservation of the rights which he possessed before settlement, for in the absence of a compensation clause his right to claim compensation is an incident of specific performance and lapses as soon as the contract has been performed so that the equitable remedy is no longer available.[12a] However if the contract provides for compensation for any error or mis-statement in the contract, the purchaser's right to compensation is not lost by completion if he was not then aware of the defect.[12b] The Auckland Law Society Standard Agreement for the sale and purchase of land contains a compensation clause couched in the following terms :

Clause 5.3

" Except as otherwise expressly set forth in this agreement, no error, omission or misdescription shall annul the sale but compensation, if demanded in writing before settlement but not otherwise, shall be made or given as the case may require."

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12. Drummoyne MC v Beard [1970] 1 NSWLR 432

12a. Jollife v Baker (1883) 11 QB 255

12b. Cann v Cann (1830) 3 Simm 447

Palmer v Johnson (1884) 13 P B D 351

This clause makes it quite clear that compensation must be demanded in writing before settlement. A claim after settlement is too late. A compensation clause has the effect of reducing the purchaser's ability to withdraw from the contract upon finding a misdescription, because the court will, unless the error is sufficiently substantial to bring into play the rule in Flight v Booth, be more ready by reason of an express agreement to require the purchaser to accept the property with compensation than it will under an open contract. In summary, within the tolerance permitted by the rule in Flight v Booth, a compensation clause may be used to require a purchaser to accept quite a large deficiency in the area of the subject property. It is not fatal to a vendors action for specific performance with compensation that the vendor had knowledge of the defect when he entered into the contract[13], nor will such knowledge on the part of the purchaser preclude his claim under the clause.[14] However, note that such knowledge does preclude a claim under an open contract. As to the questions posed earlier in the text, the following answers are proffered. There is a distinction between compensation and damages awarded in addition to specific performance. While in most instances the distinction is undetectable, there is always the qualification that there may not be "jurisdiction" in the material sense to award damages in addition to specific performance. However

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13. Re Belcham & Gawleys Contract [1930] 1 Ch 56

14. Lett v Randall (1883) 49 LT 71.
Corbett v Locke King (1900) 16 TLR 379

there is no such jurisdictional criteria imposed on the award of compensation. On the other hand one must keep in mind the recent trend towards considering equitable damages to be "compensation" for the loss suffered. Such trend brings damages in addition and equitable compensation closer still. The House of Lords in Johnson v Agnew added their support to this proposition by noting that the general principle of damages is compensatory.

So ends the section of this paper on damages. An area complicated by numerous principles and alternative courses of action.

Henceforth follows a consideration of a number of the defences which may be raised in support of the refusal of a decree.

Intermingled with these aspects are sections dealing with the Election of Remedies and the Enforcement of Testamentary Dispositions.

The transition from the examination of the entity of damages to an appraisal of numerous loosely linked concepts, it is ventured, is to be seen as illustrating on the one hand the maxim that "equity follows the law" and that equitable damages have become regulated by principle, and on the other hand the many sided nature of equity is illuminated by the multiplicity of defences.

A

NON DISCLOSURE

" Any inequality between the parties, for whatever reason ... and any taking advantage of one party by another, will be given due weight by a court of equity. "

Spry"Equitable Remedies" 2nd Ed @ 168.

The deeply entrenched common law principle of caveat emptor negates to a large extent the common law and equitable defence of non-disclosure. In recent times there has been some movement away from a strict application of the doctrine, but the general principle still applies, save where special circumstances arise.[1] Silence on a material aspect of an agreement on which a vendor has no special duty to disclose wll not prevent a vendor from obtaining specific performance.[2] The abovementioned special duty to disclose arises where the vendor is in a relationship with the purchaser which results in the contract being classed as a

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1. McKey v Rorison (1953) NZLR 498; Chitty on Contracts, General Principles 25th Ed @ para 353 ; Gabolinsky v Hamilton City Corporation (1975) 1 NZLR 150.

2. Turner v Green [1895] 2 Ch 205 ; Greenhalgh v Brindley [1901] 2 Ch 324.

contract uberrimae fidei.[3] There is an academic dispute as to where the duty, in such instances, arises out of an implied term that disclosure will be made, or that it depends simply upon general equitable principles of fairness.[4] Where this duty is breached a right of rescission arises; in such circumstances specific performance is refused afortiori, that is there will no longer be a valid contract to perform. The most frequent illustration of the breach of the duty is seen with regard to contracts of insurance. In some instances an insured will seek specific performance of the insurance policy rather than an order for the funds.[5] On numerous occasions a non-disclosure as to say inter alia previous insurance, claims history, subject matter of the insurance or material considerations will prevent an insured from obtaining specific performance of the policy.

There is one other special relationship which yields up a right of rescission, that of fiducary. The extent of this duty and the nature of the information required to be disclosed depend upon the

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3. A contract of utmost good faith. Contracts between family members and contracts of insurance are two examples of such contracts. The duty to disclose required each party involved in the contract to disclose all material facts that they ought to have known would effect the other party.
Avon House v Cornhill Insurance Co Ltd (1980) 1 ANZIR 60 429

4. See Tarr "The Duty of Disclosure in Insurance Contracts" (1981) NZLJ

5. i.e. where reinstatement is in issue.

particular equitable incidents or characteristics of the fiduciary relationship in question, no general rule can be laid down.[6] With regard to disclosure and contracts for the sale of land, a purchaser can obtain specific performance even if he did not disclose facts known to him but not to the vendor which materially increased the value of the property.

Further a purchaser who conceals his identity by buying through an agent can compel specific performance even if he knew that the vendor would not have sold the property to him if his identity has been disclosed, unless the possession by the purchaser of some personal quality is a material ingredient of the contract. However where there is a title defect a vendor of land is obliged to disclose the same.[7] If the title defect is not disclosed the purchaser has a remedy, not for a failure by the vendor to disclose its existence, but for the vendor's breach of contract in being unable to give the purchaser a good title.[8] Every contract for the sale of land

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6. Tate v Williamson (1866) L R Z Ch 55

   Note: Davies v London & Provincial Marine Ins. Co (1878) 8 Ch D 469 @ 474 -

   " if there be a pre-existing relationship between the parties, such as that of agent and principal, solicitor and client, guardian and ward, trustee and cestui que trust, then, if the parties can contract at all, they can only contract after the most ample disclosure of everything by the agent, by the solicitor, by the guardian, or by the trustee".

7. Dyster v Randall & Sons [1926] Ch 932

8. Battersby, Williams' Contract for Sale of Land and Title (4th Ed) 94; Harris v Weaver [1980] 2 NZLR 437

contains an implied term that the vendor will give a good title, and the existence of a defect is a breach of that implied term. The function of a pre-contract disclosure by the vendor is to fix the purchaser with knowledge of the existence of the defect when he entered into the contract and, if he also knew that the defect was one whose removal the vendor was not in a position to effect , to deprive him of remedy in respect of the defect.[9]

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9. Paterson v Long (1843) 6 Beav 589; 49 ER 954; Smith v Capron (1849) 7 Hare 185; 68 ER 75 ; Nicoll v Chambers (1852) 11 CB 996; 138 ER 770 ; Morley v Clavering (1860) 29 Beav 84; 54 ER 558 ; Henderson v Hudson (1867) 25 WR 860 ; Castle v Wilkinson (1870) LR 5 Ch App 534 ; English v Murray (1883) 49 LT 35 ; Re Gloag and Miller's Contract (1883) 23 Ch D 320 at 327, per Fry J (obiter); Larnach v Irving (1893) 12 NZLR 212 Hopcraft v Hopcraft (1897) 76 LT 341; Meehan v New Zealand Agricultural Co Ltd (1907) 26 NZLR 766 ; Wisley v McGruer (1909) 28 NZLR 481 (a decision which, it is suggested, is incorrect because of the effect of the Property Law Act 1908, s 81(2), but which remains a valid authority on this point) ; Radium Hill Co No Liability v Moreland Metal Co (1916) 16 SR (NSW) 631 at 635, per Harvey J: McGrory v Alderdale Estate Co Ltd [1918] AC 503 at 508, per Lord Finlay; Redapple v Hely (1931) 45 CLR 452 at 471, per Dixon CJ : Re Roe and Eddy's Contract [1933] VLR 427 at 431, per McFarlan J (orbiter); Timmins v Moreland Street Property Co Ltd [1958]1 Ch 110.

This rule as to defects of title was examined and broadened by Henry. J in Watkin v Wilson[10] a case decided in late 1984. In this case the court acknowledged that non disclosure of defects is not fatal to the validity of a contract. However when Henry J examined the Land Transfer Act 1952 and the requirement of passing good title, he noted that in the present case that the building in question was erected without a Council permit. His Honour concluded that this amounted to a latent defect in title in respect of part of the subject matter of the contract. This consideration was based on three Australian[11] cases and it was not directed at defects in quality[12]. Although the effect of Watkin v Wilson is not to exaggerate markedly the rule, however it does represent an extension, an extension in line with the recent enlightened trend in negligence.[13]

There are other cases of non disclosure, however, where there is

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10. High Court Auckland A12/81.

11. Vutelic v Sadit-Quinlan & Associates [1976] 13 ALTR 3;
Maxwell v Pinheiro (1979) 46 LGRA 310;
Borthwick v Walsh (1980) 41 LGRA 144.

12. Dell v Beasley [1959] NZLR 89 Town Planning Restrictions ;
Harris v Weaver [1980] 2 NZLR 437.

13. See: Cadenhead. J (1984) NZLJ 253
(1983) 2 CANT LR 25

no ground for rescission because, for example, there is no definite duty of disclosure, but the non disclosure may have the effect of bringing to bear a discretionary defence barring specific performance. For instance the failure to disclose certain facts or matters, may result in hardship or unfairness if performance of the contract were decreed. This position will be emphasised where at the material time the plaintiff knew of the ignorance or misapprehension of the defendant but nonetheless did not take steps to provide information or to correct the material error.[13a]

There will be other incidences where the plaintiff either negligently or carelessly assumes that the defendant knows the material information. Hence any non disclosure resulting in an inequality arising between the parties will be given due weight by a court in exercising its discretion.[14]

13a. Summers v Cocks (1929) 40 CLR 321

Fletcher v Manton (1940) 64 CLR 37 @ 50

14. Halsbury 3rd Ed Vol 34 Para 357.

Carlish v Salt (1906) 1 Ch 337 ;

Vukelic v Sadil-Quinlan (1976) 13 ACTR 3;

Beyfus v Lodge (1925) Ch 350 ;

Hope v Walter (1900) 1 Ch 257 ;

Summers v Cocks (1928) 40 CLR 321 ;

Laurence v Lexcourt Holdings Ltd [1978] 2 AllER 810 @ 817, 819.

Of a similar class to the consideration of non disclosure is that consideration comprising sharp practice and public policy. For instance the fact that the public would be misled as to the authorship of a literary work if the contract, which provided for the naming as author of a person who had not written the work, were performed has been held to be a good ground for refusing specific performance, for this would be fraud on the public.[15] The same principle applies if the plaintiff is guilty of practice amounting to fraudulent suppression.[16] Also as earlier noted a decree will be refused to a plaintiff who was aware that the defendant did not appreciate the effect of the contract.[17]

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15. Post v Marsh (1880) 16 Ch D 395;
Union Bank of London v Munster (1887) 37 Ch D 51

16. Shirley v Stratton (1785) 1 Bro CC 440.

17. Pateman v Pay (1974) 232 EG 457.
Contrast Harrop v Thompson [1975] 1 WLR 545 where specific performance was granted to a plaintiff who obtained the property cheaply at auction following a bidding agreement.

Moreover in Verrall v Great Yarmouth Borough Council[18] specific performance was granted even though there was risk of public disorder as a contract to grant a licence to use a public building was enforced against local consensus. The particular facts of this case reqired that the decree be granted despite the public attitude. Against the protection of public ideals must be weighed an individual's right to retain a sensible amount of freedom of speech and assembly.[19]

In summary the aforementioned equitable considerations all are based on the concept of conscience. This is particularly evident where, for instance, a non disclosure, which would normally have no significance, offends the conscience and inner being of the court. Unfortunately there have been few recent cases in this area so one is at a loss to discern whether there has been a change in the operation of this conscience principle. However it is ventured that the conscience of the court changes with respect to the social dictates in which it is exercised. Hence the morals which prompted Lord Eldon to dispense relief would now be regarded as unduly prohibitive in today's social climate. Therefore, it can be seen that while matters of conscience are not regulated by rules, they are dependent upon the standards of each individual judge in light of the acceptable standards of public morality.

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18. [1980] 1 A 11 ER 839

19. Miller v Jackson [1977] 3 A 11 ER 338;
Lennaway v Thompson [1980] 3 A 11 ER 329

B IMPOSSIBILITY

" Assuming the defendants to be entirely in the wrong, doing everything in contravention of the agreement, still when the court is asked to restrain them from acting under the award, it is impossible for me to do so, since the defendants have not the power of doing that which it is said they ought to do "

Per Kindersky VC Seawell v Webster (1859) 29 LJ Ch 71 @ 73

A contract may become frustrated and impossible to perform because of the occurrence of an unexpected event which destroys the foundation of the contract. The contract is then discharged and specific performance is out of the question. At law it is no defence to an action for damages that the contract has become impossible of performance through the defendant's own acts, but in equity specific performance will be denied.[1] Underlying this reasoning is the maxim that "equity will not specifically enforce what cannot be done".[2]

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1. Green v Smith (1738) 1 Atk 572 ;
   Denton v Stewart (1786) 1 Cox Eq Cas 258 ;
   Smith v Morris (1788) 2 Bro CC 311 ;
   Ferguson v Wilson (1866) 2 Ch App 77 ;
   Wycomb Pty Co v Denington Hospital (1866) 1 Ch App 268 ;
   Castle v Wilkenson (1870) 5 Ch App 534 ;
   Johnson v Agnew [1979] 1 A 11 ER 883

2. Ferguson v Wilson (1866) LR 2 Ch 77.

It is of no consequence that the impossibility may be entirely due to default on the part of the defendant, if, for whatever reason the defendant cannot possibly perform his obligation, specific performance will not be decreed against him.[3] For instance in Day v Hammet[4] a purchaser claimed specific performance of an agreement to sell a hotel and transfer the licence, however Provincial Ordinances from which the licence was granted were found to have expired. The court refused to grant the decree and left the purchaser to his remedy at law.

Of course the mere anticipation of difficulties will not be enough to move a court. If at the time of the application to the court there is the likelihood that performance may become impossible, a court may make a conditional order or order the proceedings adjourned. Such a situation has caused considerable litigation[4a] in Australia with regard to the Closer Settlement Acts of New South Wales. This act provides that a transfer or other dealing with a settlement purchase lease shall not be valid unless the consent of the Minister is obtained. Windyer. J in Brown v Heffer[5] succinctly examines the principle with regard to these conditional orders by noting that the specific performance which will be granted before the Minister's consent is obtained is not specific performance of the obligation to transfer, for that obligation has

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3. Seawell v Webster (1859) 29 LJ Ch 21.

4. (1873) 1 NZ JUR 64

4a. Kennedy v Vercoe (1960) 105 CLR 521 ;
Brown v Heffer (1967) 116 CLR 344.

5. (1967) 116 CLR 344.

not yet arisen. The decree that will be made, according to His Honour, will go no further than directing that the proper steps be taken for the purpose of obtaining the Minister's consent.[6] Hence if approval were refused, it would be impossible to comply with an unconditional order.[7] A different analysis is appropriate[8] where the contractual obligation in question is absolute and not conditional so that there will be a breach of contract if it is not performed even though the failure to perform has arisen only because a necessary consent has not been obtained.[9]

A slight derivative of the above theme is illustrated by Meech v Johnson.[10] In this case a plaintiff obtained a judgment ordering the defendant specifically to perform an agreement to lease 300 acres to the plaintiff. A portion of the land - 130 acres - was leasehold, and the local Land Board refused to give its consent to the proposed sub-lease. The Plaintiff applied for the judgment to be enforced with respect to the 170 acres. Demonstrating the application of equitable principles the court divided the contract and decreed that the defendant should perform the contract as far as was possible.

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6. per Windyer J @ 350.

7. Gasiunas v Meinhold (1964) 6 FLR 182.

8. Such analysis being based on the general principle that equity will not require that to be done which cannot be done.

9. Dillon v Nash [1950] VLR 293 ;
Warmington v Miller [1973] QB 877.

10. [1921] NZLR 310.

If it is established that the required consent can be obtained it may be found to be convenient that the material order be made absolute rather than conditional.[11]

As stated before[12] even given that a defendant is entirely responsible for the wrong which prevents performance, such obstacle may still be set up to avoid a decree. Commonly in such a case the plaintiff is found to have acquired a remedy in damages. Moreover, depending on the fact situation, performance may be ordered with suitable compensation being assessed to remedy the defect.

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11. Dillon v Nash [1950] VLR 293.

12. Note Seawell v Webster [1859] 29 LJ Ch 71
per Kindersley V.C. @ 73 :
" Assuming the defendants to be entirely in the wrong, doing everything in contravention of the agreement, still, when the court is asked to restrain them from acting under the award, it is impossible for me to do so, since the defendants have not the power of doing that which it is said they ought to do. But the extreme case of a vendor burning a title deed : the court can not make a decree that he should deliver it up ... "

B (i) TIME AT WHICH IMPOSSIBILITY IS JUDGED

At what time must the possibility of performance be determined? There is some suggestion that it is the time of commencement of proceedings which should primarily be looked at.[13] However the better view is that the time at which impossibility is judged is the proper time for performance of the contract, not the date of the contract. Thus, a person may contract to convey an estate on a future day even though he is not the owner of the estate at the date of the contract, or similarly may contract to sell goods which are not then his property. Such contracts would be enforced if the vendor has become possessed of the land or goods.[14] Similarly where contracts dealing with property require the subsequent consent of third persons for their performance, the court, as observed before, will protect the property until the sanction is obtained.[15] Accordingly a court looks at whether

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13. Ferguson v Wilson (1866) LR 2 Ch 77

14. Browne v Warner (1808) 14 Ves 409;
Carne v Mitchell (1846) 10 Jur 909;
Holroyd v Marshall (1862) 10 HL Cas 191

15. Kennedy v Vercoe (1960) 105 CLR 521;
Frederick v Coxwell (1829) 3 Y & J 514 ;
Great Western Rly Co v Birmingham and Oxford Rly Co (1848) Z Ph 597 ; Hawkes v Eastern Counties Rly Co (1852) 1 DeGM&G 737;
Devenish v Brown (1856) 26 LJ Ch 23

performance is possible as at the time the order is granted. As previously noted, in certain circumstances where a vendor is unable to convey the precise interest in land in which he had agreed to convey, specific performance may be decreed along with the payment of compensation. Hence, if the impossibility consumes part only of the contract, enforcement with compensation is a way around that fact situation.[16]

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16. Halsbury's Laws of England 4th Ed Vol 44 Para 492.

B (ii) FUTILITY OF PERFORMANCE

A court of equity will not make any order in vain.[1] Prima facia a party to an agreement is entitled to performance of its terms, and he should not be denied relief on the ground of futility unless damages are adequate or a special discretionary consideration arises.

The defence of futility differs from that of impossibility in that it may well be possible for the defendant to perform his obligations, but such performance may be futile and of no consequence. Generally it is considered by Spry[2] that it is difficult to envisage a case where relief is refused on the ground of futility when it could be said that specific performance would afford more complete and perfect justice than damages. In other words, it is perhaps unnecessarily confusing to maintain that there is such a defence as futility.[3]

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1. per Kindersley V.C. New Brunswick Co v Muggeridge (1859) 4 Drew 689 @ 699.

2. Equitable Remedies 2nd Ed @ 123

3. Nesbitt v Meyer (1818) 1 Swanst 223;
Lever v Koffler [1901]1 Ch 543;
Western v Pim (1814) 3 Ves & B 197;
Walters v Northern Coal Mining Co (1855) 5 DeGM&G 629;
De Brassac v Martyn (1863) 9 LT 287.

However there are circumstances where the lack of substantial benefits arising out of a proposed enforcement has led to damages being preferred to specific enforcement. Thus a decree has been refused to enforce an agreement to enter into a partnership at will, which could be determined immediately afterwards,[4] to enforce an agreement to grant a deputation of an office which was clearly revocable,[5] and to enforce an agreement to grant a lease for a short period of time[6] or of a lease which term has already expired.[7]

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4. Hercy v Birch (1804) 9 Ves 357;
Sheffield Gas Consumers Co v Harrison (1853) 17 Beav 294;
Renowden v Hurley [1951] VLR 13;
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418

5. Wheeler v Trotter (1737) 3 Swan 174

6. Lever v Koffler [1901] 1 Ch 543;
Manchester Brewery Co v Coombs [1901]2 Ch 608 @ 616;
Lavery v Pursell (1888) 39 Ch D 508

7. De Brassac v Martyn (1863) 9 LT 287;
Turner v Clowes (1869) 20 LT 219;
Western v Pim (1814) 3 Ves & B 197

To conclude matters ; impossibility and futility as bars to specific performance have remained unchallenged and unchanged in their complexion since their significance was first appreciated. Suffice to close with the following citation from Hall v Vernon[7a] per Dent P. "equity never does a vain thing, or enforces a void or impossible contract. Men may divide the moon by imaginary lines, but equity will not enforce their contract".[8]

7a. (1899) 34 SE 764

8. (1899) 34 SE 764 @ 765.

C THIRD PARTIES AND PERFORMANCE

" Time alone will tell whether this more liberal approach will be applied to other, and more usual, aspects of the law of specific performance. "

Hanbury and Maudsley "Modern Equity" 10th Ed @ 66.

Generally speaking it is only the parties to the contract or their representatives who should be made plaintiffs and defendants respectively in an action for specific performance. For instance, the case of Tasker v Small[1] involved a mortgagor who had sold his property. It was held that the mortgagee was not a necessary

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1. (1837) 3 Mr & Cr 63.

defendant to the purchaser's action for specific performance.[2] This rule was further applied in Howard v Miller[3] by

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2. Supra n.1 per Lord Cottenham L.C. states the rule and its justification, as follows:

" It is not disputed that, generally, to a bill for specific performance of a contract of sale, the parties to the contract only are the proper parties; and, when the ground of the jurisdiction of the Courts of Equity in suits of that kind is considered it could not properly be otherwise. The court assumes jurisdiction in such cases, because a court of law, giving damages only for the non performance of the contract, in many cases does not afford an adequate remedy. But, in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the Defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceedings to enforce the execution of it as they are to a proceeding to recover damages for the breach of it. "

3. [1915] AC 318.

Lord Parker who stated : "There is no equitable principle by virtue of which land can be taken away from the true owner under colour of specific performance of a contract to which he was not a party and which he did not authorise to be made on his behalf. The action should have been dismissed with costs so far as the supposed true owner was concerned."[4]

However it is easy to see the inconvenience that such an approach can cause. For instance, where a vendor has contracted to sell land twice over, neither purchaser may be made a party to a suit for specific performance of the other's contract; yet questions of priority will inevitably arise which can only be successfully litigated in concurrent proceedings. If a judge knows that an order for specific performance of one of the two contracts has already been awarded, a judge will be bound to refuse a decree with regard to the second.[5]

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4. Supra n.3 @ 323. Also see Hood v Cullen (1885)6 NSWLR 22; Thomson v Richardson (1928) 29SR (NSW) 221

5. It is no solution to say that the suits should be concurrently heard, as either party or the court may not agreed to this ASA Construction Pty Ltd v Iwanou [1975] 1 NSWLR 512.
Also see: Casey v Irish Intercontinental Bank Ltd [1979] 1 IR 364 @ 371

There are two general classes of instance involving third parties and the decree of specific performance. First, there are the cases where the third party has a separate contract with the defendant. In these situations specific performance has been refused where if the agreement was to be performed in specie there would take place a breach of an agreement entered into previously between the defendant and a third person.[6]

There are two classes of case under this head. In the first place, the prior contract may be one which has given rise to an equitable interest in land or to other rights which are apt to be protected by injunction or specific performance or any other such equitable relief. The second instance occurs where there is a prior agreement with a third person which is valid at law, but which is such that its obligations will not be enforced in equity. Here whether a later inconsistent agreement which is otherwise specifically enforceable

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6. Manchester Ship Canal Co v Manchester Race Course Co [1901] 2 Ch 37; Weatherall v Geering (1806) 12 Ves 504; Wilmot v Barber (1880) 15 Ch D 96; Sefton v Tophams [1965] Ch 1140 ; Contrast Hogan v Regional Centres Pty Ltd (1963) 81 WN (NSW) 59.

should or should not be enforced probably depends largely on more general considerations, such as questions of hardship[7] and fairness[8] to the defendant or the third party.

Special consideration as to the possibility that specific performance will involve a breach of contract with a third person will, on grounds of policy, often convince a court against making an order which will have such an effect[9], unless there are found opposing circumstances which justify the grant of relief.[10]

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7. Watts v Spence [1976] Ch 165; Cedar Holdings Ltd v Green [1981] Ch 129 ; Williams & Glyns Bank v Boland [1981] AL 487 ; Hutchinson v Payne [1975] VR 175.

8. Thomas v Dering (1837) 1Keen 729; McKewan v Sanderson (1875) LR20 Eq65 ; Byrne v Acton (1721) 1 Bro Par 1 Cas 186 ; Briggs v Parsole [1937] 3 A 11 ER 831 ; Willmot v Barber (1880) 15 Ch D 96 ; Delves v Gray [1902] 2 Ch 606.

9. Warmington v Miller [1933] QB 877.

10. For example; if it appears that the contract with the third person will not be performed.

The second general class of case concerns third parties who have no contractual relationship to the defendant or plaintiff. An example of such class is in contracts for the sale of land where a purchaser has sought specific performance against a vendor who is unable to give a good title without the consent of some third person, or where he has contracted to give possession and some third party is in possession. McGarry. J recently summarised the position as relates to third parties in this area in Wroth v Tyler.[11] In that case the learned Judge refused to decree specific performance which would compel the defendant to take legal proceedings against his wife, who had, after the contract and without his knowledge, registered rights of occupation under the

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11. [1973] 1 A 11 ER 897.

Matrimonial Home Act 1967, and with whom he was still living.[12] The prevalent difficulty underlying this area is the usual privity rule, which states that third party cannot enforce a contract himself. A gloss on this principle is whether a plaintiff may obtain specific performance on behalf of a third party.

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12. Supra n. 11 per McGarry. J @ 913.

" A vendor must do his best to obtain any necessary consent to the sale; if he has sold with vacant possession he must, if necessary, take proceedings to obtain possession from any person in possession who has no right to be there or whose right is determinable by the vendor, at all events if the vendor's right to possession is reasonably clear; but I do not think that the vendor will usually be required to embark on difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession. Where the outcome of any litigation depends on disputed facts, difficult questions of law or the exercise of a discretionary jurisdiction, then I think the court would be slow to make a decree of specific performance against the vendor which would require him to undertake litigation. "

Prior to the enactment of the Contracts Privity Act 1982 the principal case in this sphere was Beswick v Beswick.[13] In that case one Peter Beswick made an arrangement with his nephew under which a family business was transferred to the nephew, and the nephew promised to employ Peter as a consultant for a weekly wage, and after his death to pay to Peter's widow 5 per week for her life. Payments were made to Beswick Senior during his life, but soon after his death ceased to be paid to his widow. The widow took out letters of administration of Peter's estate and sued both as administratrix and in her own right under the contract. The House of Lords held that she was entitled as administratrix to specific performance of the promise to make the weekly payments. However, she was unable to sue in her own right because of the rule of privity.

Despite the criticism[14] which has been directed at the reasoning used in Beswick the House of Lords should be applauded for taking a broad equitable view, a view in line with the overall liberalising trend within the equitable jurisdiction the last few years. In Beswick there was an unconscionable breach of faith and the equitable remedy sought was apt. With regard to the extending of this equitable principle Lords Pearce and Upjohn[15] in Beswick both approved the dictum of Windyer. J in Coulls v Bagots Executor and Trustee Co Ltd[16] in which he stated

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13. [1968] AC 58.

14. Hanbury. "Modern Equity" 10th Ed @ 63.

15. Ibid @ 102.

16. (1967) 119 CLR 460.

" It seems to me that contracts to pay money or transfer property to third persons are always, or at all events very often, contracts for breach of which damages would be an inadequate remedy - all the more so if it be right (I do not think it is) that damages recovered by the promisee are nominal ... I see no reason why specific performance should not be had in such cases ... but of course not where the promisee was to render some personal services. There is no reason today for limiting by particular categories, rather than by general principle, the cases in which orders for specific performance will be made."

The decision in Beswick v Beswick has since been applied in Gurtner v Circuit[17] a case involving one of the most prolific modern exponents of equitable principles, who oddly enough is not a Chancery Judge, that being Lord Denning. The above stated case concerned the Motor Insurers' Bureau's contract with the Minister of Transport. By virtue of this contract, if an injured person's judgment against a motorist is not satisfied within seven days, the Bureau will pay the injured person. While the injured person cannot sue, the Minister can obtain specific performance in his favour. The Court of Appeal was unanimous in the view that if the Minister obtained specific performance, the injured person could enforce the order for specific performance for his own benefit. Lord Denning M.R. went so far as to say that if the Minister of Transport should hesitate to sue, he thought that it may be open to the plaintiff (i.e. the injured person) to make him a defendant and thus compel performance. The majority view, however, was that the Minister was the only person entitled to bring an action.

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17. [1968] 2 QB 587

It is noted that one of the exceptions[18] to the privity rule is that the promisee can sue on behalf of the beneficiary. However the overriding cannon is that the promisee cannot recover damages on behalf of the beneficiary. Lord Denning attempted to reverse this rule in Jackson v Horizon Holidays[19], but the House of Lords has since in Woodar v Wimpey[20] restored the earlier law. However since damages cannot be an adequate remedy, it may be that much easier for the promisee to obtain specific performance of the promise to benefit the beneficiary.[21] Therefore prior to the Contracts Privity Act 1982 a promisee wanting to assist a beneficiary could do so by obtaining specific performance against the promisor.

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18. Exceptions to the rule being inter alia :

(a) Express or Implied Trust Re S Chebsman [1944] Ch 83

(b) Deeds and S. 7 Property Law Act 1952 Re Wilsons Settlements [1972] NZLR 13.

(c) Agency and collateral contract NZ Shipping Co v Satterthwaite [1975] AC 154.

19. [1975] 1 WLR 1468.

20. [1980] 1 A 11 ER 571

21 Beswick v Beswick [1969] AC 58

C (i) THE CONTRACTS PRIVITY ACT 1982

Section 8 of the Contracts Privity Act 1982 states as follows :

" The obligation imposed on a promisor by section 4 of this Act may be enforced at the suit of the beneficiary as if he were a party to the deed or contract, and relief in respect of the promise, including relief by way of damages, specific performance, or injunction, shall not be refused on the ground that the beneficiary is not a party to the deed or contract in which the promise is contained or that, as against the promisor, the beneficiary is a volunteer. "

Hence a beneficiary need no longer rely on the intervention of the promisee in order to force specific performance of the contract conferring the benefit.

The Contracts and Commercial Law Reform Committee wanted to enable the beneficiary himself to enforce the contract made for his benefit unless the parties had intended otherwise.

Section 4 of the Act is the section which provides that promises for the benefit of a third person can be enforced by that person. It ends with the proviso that the section shall not apply to a promise which, on the proper construction of the contract, is not intended to create, in respect of a benefit, an obligation enforceable at the suit of the beneficiary. Accordingly, if the parties wish to escape the application of the Act, all they have to do is to declare in their contract, in a manner clear enough to be proof against

interpretation contra proferentum, their intention that the third party beneficiary be not entitled to sue.

It is submitted that, initially, the Contracts Privity Act has molified the law relating to the rights of third parties. Hence the legislature has expressly directed the courts attention to third parties. Therefore it is ventured that the interests of third parties, whether this involves the breach of contract, hardship or fairness or other related discretionary defences with regard to third parties, will be examined more closely and will tender themselves more readily to defeating an application for a decree.

D ILLEGALITY AND PERFORMANCE

" There is in my view a further principle of equity that even though a transaction be tainted with illegality on the ground that its performance is contrary to public policy, equity will interfere if on the same grounds of public policy the transaction ought not to be allowed to stand. "

Per Jacobs J Money v Money [1966] 1 NSWLR 348 @ 351

A court will not interfere directly to enforce an illegal contract by granting specific performance.[1] On the face of it illegality will invalidate the contract as a whole and hence there will be nothing to enforce.

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1. Briggs v Parsloe [1937] 3 AllER 831.

Such illegality is normally an absolute bar to specific relief, as is shown by numerous authorities.[2]

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2. Trimble v Brisbane Municipal Council (1894) B.C. (Nes). Q.Sup C.;
O'Carroll v Potter (1928) 29 SR (NSW) 393 ;
Roseville Extended Ltd v Lucas (1926) 26 SR NSW 402 ;
Shannon v Crowe (1922) 6 LGR 91 ;
Gasiunas v Meinhold (1964) 6 FLR 182 ;
Benbow v Leonard [1975] 1 NSWLR 122 ;
Walsh v Alexander (1913) 16 CLR 293 ;
Robertson v Admans (1922) 31 CLR 250 ;
Egan v Ross (1928) 29 SR (NSW) 382;
Lang v Castle [1924] 5 ASR 255;
Norton v Angus (1926) 38 CLR 523;
Paterson v Murray (1897) 15 NZLR 487;
Gilmer v Crawford (1906) 26 NZLR 657;
Williams v Harley (1899) 18 NZLR 174;
Caldwell v Kirby [1948] GLR 335;
Nicholls v Nicholson [1944] GLR 252;
Exton v Grenville [1952] NZLR 484.

Where a statutory provision brings to an end a contract, obviously, specific performance a fortiori will not be possible. There are however situations where an action at law for damages will succeed, but a decree will be denied in equity in view of a possible subsequent illegality. If a court of equity deems it necessary to take this course of action it is submitted that it will be based upon grounds of hardship and policy. This position was considered in Pottinger v George[3] where a contract for the sale of land was sought to be specifically performed. The vendors failed to complete on the due date and further, the existing use of the land did not conform with the Town Plan of the City of Brisbane, as consent to the existing use had not been obtained. The High Court of Australia considered that given the circumstances the initial question was whether it could be proved that the use to which the land was being put when the contract was executed was unlawful. This matter would be decided according to whether an appropriate consent had been given at the time. The purchasers did not purport to rescind the contract on this ground but raised it, by way of defence to a claim for specific performance.[4] It was acknowledged by the court that it would not be proper to decree specific performance if the result would be to expose the purchasers to risk of prosecution. After balancing the counterveiling factors the court held that the contract should be specifically performed, the risk of subsequent illegality being offset by other factors.[5]

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3. (1967) 116 CLR 328.

4. Supra n. 3 @ 337.

5. Supra n. 3 @ 338-9.

If the contract remains enforceable, a further discretionary equitable consideration comes into play - that being that a plaintiff seeking enforcement of a contract must come to equity with "clean hands". There are instances where even though the plaintiff has caused the illegality, he will be able to avoid the defence of clean hands as set up by the defendant by showing that the illegality is not causative with relation to the performance of the contract. That is the illegality in question cannot be said to be "directly resulting from the crime".[6] Such a result can be obtained by severing an illegal part of a transaction from the untainted components. Moreover pleading may be framed in such a way that the cause of action does not depend on the illegality in question.

At first blush it was felt that such principles were not in keeping with the true canons of equitable relief. However after examining Thomas Brown and Sons Ltd v Fazal Deen[7] the principles applied do now not seem so "inequitable". In that case a plaintiff deposited gold and gems in a safe with H. The National Security Regulations in force at the time required every person having gold in his possession or control to deliver it to the Commonwealth Bank within one month after it had come into his possession. The gold was not delivered up. The plaintiff demanded return of his gold and gems.

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6. Ewing v Osbaldiston (1837) 2 My & Cr 53.

7. (1962) 108 CLR 391.

The plaintiff claimed the return of the chattels or their value and damages for breach of the contract of bailment. It was held that the performance of the contract of bailment was illegal. The terms of the bailment relating to the gold, however, were severable from those relating to the gems in the safe, which did not contravene the statute and were not illegal.[8]

Further, certain collateral transactions may be specifically enforced, even though they concern an original transaction tainted with illegality. For example, a beneficiary can enforce performance of a trust against the trustee, even though the transaction in respect of which the money or property was transferred to the trustee was unlawful and could not have been enforced by the beneficiary against the person who so transferred to the trustee.[9]

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8. Also Bank of Australasia v Breillat (1847) 6 Moo PC 152;

9. Powell v Knowler (1741) 2 Atk 224;
Thomson v Thomson (1802) 7 Ves 470;
Tenant v Elliot (1797) 1 Bos & P 3;
Farmer v Russell (1798) 1 Bos & P 296;
McCallan v Mortimer (1842) 9 M&W 636, Ex Ch.

In summary, in the absence of any statutory intention to the contrary, an illegality in performance that has taken place which does not cause the material contract to be void or unenforceable at law should not necessarily prevent the granting of specific performance, although such circumstances as the fact of a deliberate and conscious commission of an illegality should be regarded as relevant to the exercise by the court of its discretion.[10]

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10. Spry "Equitable Remedies" 2nd Ed 137

D (i) THE ILLEGAL CONTRACTS ACT 1970

For many years there had been dissatisfaction[11] of the law with regard to illegality.

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11. In St John Shipping Corporation v Joseph Rank Ltd [1957] 1 QB 267 @ 289 Devlin J. said :

"Commercial men who have unwittingly offended against one of a multiplicity of regulations may nevertheless feel that they have not thereby forfeited all right to justice, and may go elsewhere for it if courts of law will not give it to them. In the last resort they will, if necessary, set up their own machinery for dealing with their own disputes in the way that those whom the law puts beyond the pale, such as gamblers, have done. "

McCarthy J. in Carey v Hastie [1968] NZLR 274 @ 282 remarked:

" There are few areas in the law of contract which cause more trouble than that of illegality, and it may be, as some writers urge, that the time has come when the Legislature might look carefully at this subject and consider doing something to remove the over-severe consequences which sometimes flow from a breach of one of the less important of the very large number of regulations which a managed welfare State seems to require. But until that is done, we have to apply the law as it is. "

In October 1969 the Contracts and Commercial Law Reform Committee presented a draft bill which was eventually to become The Illegal Contracts Act 1970. The principal reasons advanced by the commission for the legislation were : (1) the harshness of the consequences that follow from the classification of the contract as illegal (2) the operation of the doctrine under which in some cases the courts could sever the offending portion of a contract and enforce the remainder as a valid contract ; (3) the difficulty of categorisation of contracts which were in breach of common law or legislative provisions. While some contracts were seen to fall within an express prohibition directed against their formation, in which case neither party could enforce the contract or acquire rights under it, others might be enforceable by one or both parties despite the fact that the performance of the contract was in breach of a prohibition. The effect of the Act was not to attempt to define "illegal contract".

Sections 3[12] and 5[13] combined provided that a contract is illegal if it is so classified by the existing law, whether the illegality arises from the creation or the performance of the contract, but a contract lawfully entered into does not become illegal by reason of its performance being in breach of an enactment unless that enactment expressly so provides or its object clearly so requires.

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12. "Illegal contract" defined -"Subject to section 5 of this Act, for the purposes of this Act the term "illegal contract" means any contract that is illegal at law or in equity, whether the illegality arises from the creation or performance of the contract; and includes a contract which contains an illegal provision, whether that provision is severable or not."

13. Breach of enactment -"A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires."

The result is that the former categories of contracts illegal as contrary to public policy are preserved, but contracts which were void on that account are not within the definition. Such distinction between contracts which are void or unenforceable and those which are illegal, was expressly affirmed by the Court of Appeal in Harding v Coburn[14] and it has since received general application.[15]

In both Sections 3 and 6 of the Act the phrase "at law or in equity" is used. This, it is submitted, demonstrates the intention of the legislature that equitable rules with regard to illegality will also be subject to the Act. Unlike the Contractual Remedies Act and the Contractual Mistakes Act there is no specific mention of how equitable rules and remedies are to interact with the Illegal Contracts Act. Moreover, there is no express direction as to equitable notions in Section 11 of the Act, the "Savings Section".

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14. [1976] 2 NZLR 577.

15. Ross v Henderson [1977] 2 NZLR 458. P.c.
Barsdell v Kerr [1979] 2 NZLR 731.

There is no doubt as to the important consequences that the Act has upon the remedy of specific performance, particularly given that the Act contains, in vogue with the other contractually codifying statutes, a wide relief section allowing a court to exercise a controlled discretion with regard to the validation and enforcement of illegal contracts.

Section 7 provides inter alia that any party to a contract who is disqualified from enforcing it by reason of an illegal act may obtain such relief by way of restitution, compensation variation of the contract, validation of the contract in whole or part .... or otherwise howsoever as the court in its discretion thinks just.[16]

The section plainly refers to any party enforcing a contract. It is submitted these words underline the fact that specific performance of contracts is encaptured squarely by the Act. The question therefore is, as the Illegal Contracts Act now determines whether an illegal contract should be enforced or not, rather than the pre-existing equitable rules, how does the position under the Act differ?

In considering whether to grant relief under Section 7 the court is directed to have regard to"(a) the conduct of the parties; and (b) in the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for any breach thereof ; and (c) such other matters as it thinks proper; but shall not grant relief if it considers that to do so would not be in the public interest."[17]

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16. Illegal Contracts Act 1970 5.7 (1)(b), 5.7 (1)(c).

17. Illegal Contracts Act 1970 5.7 (3)(a)(b)(c).

Moreover Subsection 6 of Section 7 provides " Any order made under subsection (1) of this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit." Given that normally statutes are seen as inflexible instruments to be mollified by the courts it is respectfully submitted that as between the Illegal Contracts Act and the law there is a reversal of this position. It is ventured that the statute provides a wider discretion to grant relief by way of performance than the pre-existing equitable rules allowed. A court is not restricted by the underlying equitable maxims, and under the act it is released to vary the contract if it so desires. It is interesting to note the phrases "thinks fit"[18] and "thinks proper".[19] The legislature did not use the phrase "thinks just" or "what is just and reasonable". Possibly an indication that justice and fairness are not foremost in the rationale behind the section.

In summary a contract that is illegal within the broad criteria of the Act will not be enforceable by decree unless the court desires to make it so under Section 7.

That a court has a wide discretion is in keeping with equitable principles. While "conscience" may not be foremost in the mind of a court as opposed to the sanctity of a contract, it is submitted that the power to validate and enforce an illegal contract will often prevent a great injustice and deny a party the opportunity of

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18. Section 7 (6)

19. Section 7 (3)(b)

sheltering behind an Act of Parliament in order to avoid his obligations - both contractual and moral. For example in Hurrell v Townend[20] a contract for the sale and purchase of two blocks of farm land was executed. The purchaser was unwilling or unable to complete, he was unable to find the purchase moneys. The purchaser's solicitors seized upon the fact that the Land Settlement Promotion and Land Acquisition Act 1952 had not been complied with. That is, the requisite land less declaration had not been filed at the Land Transfer Office. The Court of Appeal held that the contract was unlawful and of no effect. So at this juncture the purchaser had achieved his objective of escaping from his bargain. However, the court validated the contract under Section 7 of the Act.[21]

Specific performance and the Illegal Contracts Act 1970 were also averted to by the Court of Appeal in the recent case of McLachlan v Taylor.[22] As will be noted[23] the purchaser, as in Hurrell v Townsend relied on a breach of the Land Settlement Promotion Act to avoid performance of a contract on the ground of illegality.

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20. [1982] 1 NZLR 536.

21. In reaching this conclusion the Court of Appeal reasoned that in purchasing the farms the purchaser would not be defeating the object of the Land Promotion Act - that being the aggregation of land.

22. Unreported C.A. 59/84.

23. Page 131 "Election".

The Court's task was simplified by the fact that the Local Land Tribunal had approved the transaction by the time the Appeal Court considered the above. Therefore there was no risk that the objects of the Land Settlement Promotion Act would be defeated. Delivering the judgment of the Court of Appeal Cooke J. validated the contract under the Illegal Contracts Act, varied the completion dates in the contract, and ordered the contract to be specifically performed. A potential problem is highlighted by the above two Court of Appeal cases, that being, if it cannot be established categorically that validation of the contract will not frustrate the purposes of the particular act, then the person seeking to rely on the breach, whether he was responsible for it or not, will be able to avoid the contract. That is a highly inequitable situation, for a person is relying on his own "questionable conduct". However it is submitted that the simple way around this position is for the court to validate the contract conditional upon the Local Land Settlement Board consenting to the transaction.[24]

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24. Such a course has yet to be adopted by a court in a reported decision.

In summary a court may grant specific performance of a contract which, although illegal when made, is subsequently validated by a court under the Illegal Contracts Act. Moreover, a court may be able to sever the illegal term from the legal terms of the contract, which is otherwise enforceable. To facilitate the same, the Illegal Contracts Act was enacted and this is in accord with the other statutory products of the Contracts and Commercial Law Reform Committee which have yielded discretions to be exercised on principles of fairness and hence based on the conscience of the person exercising them.

E ELECTION AND INCONSISTENT COURSES OF ACTION

Difficulties arise when a plaintiff first commences an action for damages at law, and subsequently sues for specific performance. If the prior proceedings for damages were directed merely at an inessential breach, or to an essential breach which the plaintiff has elected to treat as inessential by waiving his right to cancel, the agreement is still in tact and the plaintiff may proceed to obtain his decree. Therefore if the proceedings for damages involve an election to treat the agreement as at an end, the subsequent action for specific performance will fail, since there is no contract in existence.[1] Moreover, if the initial action for damages was misconceived, this may in some circumstances, be found to involve a repudiation on the part of the plaintiff, giving the defendant in turn a right to cancel. If this is the position then specific performance is impossible, as once again there is no contract on foot.[2]

The position as regards the intermingling of causes of action is admirably broken down by Lord Wilberforce in Johnson v Agnew. First, his Lordship states "in a contract for the sale of land, after time has been made or become of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract,

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1. Fullers Theatres v Musgrove (1923) 31 CLR 524.

2. Fennings v Humphrey (1841) 4 Beau. 1

Johnson v Agnew [1980] AC 367

both parties being discharged from further performance of the contract".[3] As an alternative to this first course of action the plaintiff "may seek from the court an order for specific performance with damages for any loss arising from delay in performance".[4] "Secondly, the vendor may proceed by action for the above remedies in the alternative ; at the trial he will however have to elect which he is pursuing. Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance".[5] Therefore in short, unless there can be established an effectual election to cancel by one of the parties the mere bringing of an inconsistent action for damages will not provide a necessary bar to subsequent proceedings for specific performance, although it may be taken into account by a court in exercising its discretion. It has been said, for example, that the institution of proceedings, even where it has no other effect "is still an important element in the court's exercise of its discretion on the ground of laches".[6]

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3. Johnson v Agnew (Supra n.2) per Lord Wilberforce @392 .

4. Ibid @ 392

5. Ibid @ 392

6. Fullers Theatres Ltd v Musgrove (1923) 31 CLR 524
   But on principle a plaintiff can only fail on these grounds only if (i) he or the defendant has brought an end to the contract at law or (ii) the conduct of the parties gives rise to laches or some other recognised discretionary consideration which renders the grant of relief unjust.
   See : Du Sautoy v Symes [1967] Ch 1146.

The overriding principle in this area is that if damages have been awarded any grant of specific relief will be limited so that the plaintiff does not in truth obtain double relief. Hence even in the absence of an effective rescision by one of the parties, specific performance of a particular obligation is often refused in order that duplicate remedies are not allowed in satisfaction of what is "one and the same matter". In some cases these principles may be relied upon by a plaintiff so as to enable specific performance of part only of a contract to be obtained and damages as to part.[7] The area of controversy arises when an order for specific performance has been made and is not complied with by the defendant. Recent authority states that such non-compliance (in as much as it amounts also to a serious breach of contract) constitutes a fresh ground for discharge and damages including damages for loss of bargain.[8] This proposition has not always received such support. Far from it. Jessel M.R. laid down in Henty v Schroder[9] that a vendor could not at the same time obtain an order to have the agreement rescinded and claim damages against the defendant for breach of the agreement.

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7. Fullers Theatres v Musgrove Supra n. 6

8. Stevter Holdings Ltd v Katra Construction Pty Ltd [1975] 1 NSWLR 459, 468 - 9 per Helsham J ;
Johnson v Agnew [1980] AC 367 @ 394 per Lord Wilberforce

9. (1879) 12 Ch D 666 @ 667

Henty v Schroder became the beginning of a well trodden path of authority.[10] However after noting an ever increasing amount of adverse academic[11] and judicial authority[12] the House of Lords in Johnson v Agnew firmly ended the idea that damages were not recoverable if there was repudiation after a decree by the plaintiff. In short, the House of Lords has reconsidered the right of an innocent party to a contract for the sale of land to damages on the contract being put an end to by accepted repudiation. In departing from previous authority their Lordships dispensed with a second basis for the denial of damages. This, now redundant argument, proposes that by seeking the remedy of specific performance the plaintiff has made an election which either is irrevocable or which becomes so when the order for specific performance is made.[13] Lord Wilberforce[14] dispenses with this argument by first noting that election is a doctrine based on common sense and equity. His Lordship continued ... "A vendor who seeks (and gets) specific performance is merely electing a course which may or may not lead to implementation of the contract ; what he elects is not eternal and unconditional affirmation, but a continuance of the contract under the control of the court, which control involves the power, in certain events, to terminate it."

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10. Hutchings v Humphreys (1885) 54 L J Ch 650; Jackson v De Kadich [1904] WN 168 ; Barber v Wolfe [1945] Ch 187 ; Horsler v Zorro [1975] Ch 302; Capital and Suburban Properties v Swycher [1976] Ch 319

11. Voumard "Sale of Land in Victoria" @ 499 - 508.

12. McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457; Holland v Wiltshire (1954) 90 CLR 409.

13. Capital and Suburban Properties v Swycher [1976] Ch 319 such case underlies the estopple argument.

14. Supra @ 393.

A further difficulty arises where specific performance and common law damages are claimed in the one action. Where in a court of legal and equitable jurisdiction a plaintiff seeks specific relief, may he recover damages at law. This is another way of expressing the difficulty[15]. The view of the courts is that the plaintiff should have made an express claim for damages[16], which will ordinarily be defined as embracing both legal and equitable damages[17]. In New Zealand, and it is assumed in England, it is sufficient for the purposes of clarity that a plaintiff has included a general claim for damages in his prayer for relief. Moreover, a prayer for "such further or other relief as this honourable court sees fit" is wide enough to encompass the expression of damages required it is submitted.

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15. The difficulty arises from the fact that courts of equity do not entertain applications for specific performance if legal remedies are regarded as adequate; See generally Spry "Equitable Remedies" 2nd Ed @ 58ff.

16. This is unnecessary in the case of Lord Cairn's Act damages. See: Leeds Industrial Co-op Society v Slack [1924] A C 851.

17. McKenna v Richey [1950] VLR 360.
Johnson v Agnew [1980] A C 367

There is a line of cases[1] proclaiming once proceedings have been commenced for specific performance the parties' rights under the contract are held in limbo. Therefore an innocent party cannot rely on a breach made after proceedings have been filed.[2] In essence the contract can no longer be discharged by either party accepting the other's repudiation. As a consequence, according to this doctrine, if a party not in breach seeks specific performance of a contract, and pending the hearing of proceedings the other party commits a flagrant repudiation of the contract, the plaintiff is unable to exercise his common law right of saying "I put an end to this contract". Therefore all legal and contractual rights, it would appear, vanish once proceedings are filed.[3]

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1. Horsler v Zorro [1975] Ch 302;
Sudagar Singh v Nazeer [1978] 3 A ll ER 817;
Capital & Suburban Properties Ltd v Swycher [1976]Ch 319;
Johnson v Agnew [1978] Ch 176 C.A.;
Buckland v Farme & Moody [1978] 3 A llER 929.

2. This applies even before a decree is granted.

3. The same would appear to be true once the court has ordered a decree for specific performance.

The underlying propositions for such remedy would appear to be (a) that there can be no such thing as discharge of a contract by acceptance of repudiation, which is effective from the date of that acceptance, as distinct from rescission ab initio and (b) that by commencing proceedings a plaintiff elects to abandon for all time his common law rights in respect not only of past breaches but also of future breaches.

As to the first ground, this was rejected soundly by the House of Lords in Johnson v Agnew[4]. The second ground was also conclusively laid to rest in that same case. However there are still two problems outstanding. The House of Lords stated the position in England as being that a contract of which specific performance is sought can be repudiated notwithstanding that the decree has been made or that proceedings have been commenced - but only with the court's leave. In Australia leave is unnecessary before a decree is made, but once an order is sealed leave of the court is necessary[5]. The basis on which Lord Wilberforce put the English position in Johnson v Agnew is as follows :

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4. [1980] AC 827; Also see McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457; Albery (1975) 91 LQR 337; Gummow (1976) 92 LQR 5.

5. Ogle v Comboyuro Investments Pty Ltd (1976) 136 CLR 444; Facey v Rawsthorne (1925) 35 CLR 566; Stevter Holdings Ltd v Katra Construction Ltd [1975] 1 NSWLR 459; Buckman v Rose (12 November 1980, unreported) ; JAG Investments v Strati [1981] 2 NSWLR 600

" Once the matter has been placed in the hands of a court of equity, or one exercising equity jurisdiction, the subsequent control of the matter will be exercised according to equitable principles. The Court would not make an order dissolving the decree of specific performance and terminating the contract (with recovery of damages) if to do so would be unjust ...." [5a]

Therefore an innocent party needs some assistance from the court, either to set aside the decree and the contract[6] or to give him leave to accept the repudiation as discharging him from future obligations[7] or to set aside the decree in order to render effective the discharge of the contract[8].

5a. Supra @ 399.

6. Johnson v Agnew supra per Lord Wilberforce @ 394 " ... the vendor ... may apply to the court to dissolve the order and ask the court to put an end to the contract".

7. Johnson v Agnew [1978] Ch 176 (C.A.) per Buckley L.J @ 190-1; Goff L.J. @ 196 " ... the vendor has not, neither has the court, any power to rescind the contract, and the true principle is that, notwithstanding, its previous order the court allows the vendor to accept the repudiation, which he had formerly declined to do ..."

8. Stever Holdings Ltd v Katra Construction Pty Ltd Supra ; Austins of East Ham Ltd v Macey [1941] Ch 338.

There is no support in principle for an equitable discretionary power as is required by the above propositions. Where it is accepted this is done as a reluctant concession to established authority. For example the Australian High Court in Ogle v Comboyuro Investments Pty Ltd[9] which, while not required to decide the status of a purported discharge after decree, decided in a case where a decree had been sought and not obtained, but the proceedings were still on foot, that the only difficulty lay in the risk of double recovery and that risk was eliminated because on the award of damages the plaintiff would be precluded from seeking relief in specific performance[10].

Moreover, equitable remedial powers can only be invoked where the common law remedy is inadequate[11], hence given the efficacy of the contractual process of discharge for breach, there is no room for an equitable judicial power to discharge the contract[12].

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9. (1976) 136 CLR 444

10. Supra n. 9 per Barwick C J @ pp 452-3;
Gibbs, Mason & Jacobs JJ @ pp 460-1.

11. Adderley v Dixon (1824) 1 Sim & St 607;
Beswick v Beswick [1968] AC 58.

12. See generally Singh v Nazeer [1979] Ch 474 @ 480-1 per McGarry V.C. ;
Johnson v Agnew [1980] A C 367 @ 394 per Lord Wilberforce.

With regard to this entire aspect of specific performance the New Zealand Court of Appeal has very recently considered the position as to the election of remedies in McLachlan v Taylor[13]. In this case the vendors of a piece of land sought to enforce a $135,000 contract with the purchaser. By oversight a clause making the transaction subject to the Land Settlement and Promotion Act 1952 was not included in that contract. For various reasons the purchaser wished to extricate himself from the contract and he took the point that the contract was illegal under the 1952 Act. On appeal the purchaser argued that by their conduct the vendors elected to forego their rights to specific performance and should be limited to their remedy in damages. Such contention was based on two letters sent by the vendor's solicitors to the purchaser's solicitors. His Honour Mr Justice Cooke made it clear that any election requires an unequivocal choice between two inconsistent alternatives. The letters were found not to amount to an unequivocal election between damages and specific performance. The letters referred to a subsequent offer which the vendors said they were considering and would now follow up. However such negotiations did not result in an unconditional contract being formed and this, in Cooke. J's view, was the reason the choice was not unequivocal. His Honour summarised his view in this way : "A mere attempt by a vendor to mitigate his position by reselling, if it proves to be fruitless, does not, we think, relieve the purchaser from his ordinary contractual duty or deprive the vendor of his primary remedy of specific performance".[14]

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13. Unreported Court of Appeal C A 59/84.

14. Supra n.13 @ 4.

The Court of Appeal validated the contract under the Illegal Contracts Act 1970 and ordered that it be "specifically performed according to its terms as validated".[15]

To conclude matters along with the area of equitable damages Johnson v Agnew has crystallised a hitherto complicated area with regard to specific performance. Further, the New Zealand Court of Appeal, while not expressly alluding to Johnson v Agnew has shown itself willing to act according to common sense and equitable principles as opposed to slavishly following an amalgam of precedent which has petrified over a number of years.

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15. Supra n. 13 @ 7.

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MUTUALITY

Where equity will decree specific performance in favour of a purchaser or lessee, the remedy will be available also in favour of a vendor or lessor. A similar principle applies to deny specific performance, on grounds of lack of mutuality, where the situation is one in which that remedy could not be available to the other party. That is one party is not compelled to perform if he would himself be left with only a remedy in damages. For example, if by reason of personal incapacity or any other matter the defendant cannot obtain specific performance against the plaintiff, then the plaintiff will not be granted specific relief even though taking the defendant's obligation by itself, this would be an appropriate remedy[1].

According to Kekewich J. it "is a technical doctrine, but like many technical doctrines, founded on common sense. It comes simply to this, that one party to a bargain shall not be held bound to that bargain when he cannot enforce it against the other"[2].

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1. E.g. Flight v Bollard (1828) 4 Russ 298 per Leach MR :

" No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed that it is a general principle of courts of equity to interpose only where the remedy is mutual. "

2. Wylson v Dunn (1887) 34 ChD 569

The description and definition of mutuality initially was first attempted by Fry[3]. Suffice to say that this exposition[4] has been heavily criticised[4a] over the years, such criticism being constructive and enabling the following definition to be proffered - the defence of mutuality arises if the defendant in proceedings for specific performance is able to show that if he were ordered to perform specifically his contractual obligations he would not, in all the circumstances, be himself sufficiently protected, having regard to such unperformed obligations of the plaintiff as might not be susceptible of subsequent specific enforcement[5]. This definition is consistent with views expressed in a number of other authorities[6].

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3. "Specific Performance" 6th Ed p. 219.

4. Supra n.3 @ 219 " A contract to be specifically enforced by the court must, as a general rule, be mutual - that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. "

4a. Ashburner, Principles of Equity 2nd Ed 404;
Cook "The Present Status of the Lack of Mutuality Rule" (1927) 36 Yale LJ 897;
Price v Strange [1978] Ch 337 ; Gummow Meagher & Lehane Equity Doctrines & Remedies 2nd Ed @ 2031-2032.

5. Spry, "Equitable Remedies" 2nd Ed @ 83.

6. Williamson Ltd v Lukey & Mulholland (1931) 45 CLR 282 @ 298;
Kell v Harris (1915) 15 SR (NSW) 473.

The importance of the above statement is that it takes account of two things : (a) that "mutuality" is not a requirement that the defendant, if he, rather than the plaintiff, had started proceedings, could have obtained specific performance ; and (b) that the relevant date is the date when the decree is made.

To reach the above crystallised position it was necessary to consider the various situations in which mutuality was seen as being a bar to relief, the reason for this being that the principles which apply to the defence of mutuality would appear to fluctuate given differing circumstances.

The principal situation arises where a defendant infringes one or more of the discretionary defences[7] and hence could not enforce the contract. Therefore if and when the plaintiff attempts to seek a decree he is taken to waive the benefit of the discretionary defences. Accordingly it will be no longer inequitable to enforce his own obligation in specie and so he will not be refused relief on the ground of lack of mutuality[8].

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7. e.g. Clean Hands, Fairness, Hardship, Laches, Nondisclosure.

8. Hope v Hope (1857) 8 De GM&G 731.
Note: A similar analysis is appropriate where the defendant has committed an essential breach. In this instance the plaintiff waives his objection to the breach by bringing proceedings for Specific Performance ; Sutherland v Briggs (1841) 1 Ha 26 @ 34.

A second situation concerns the position where a defendant might have brought an action for specific performance at some earlier time but this would have been refused on the ground that damages were an adequate remedy. However when comes the time for the plaintiff to seek enforcement, damages may not be an adequate remedy. The answer to this problem, in short, is that it does not follow that merely because the defendant could not formerly have proceeded for specific performance, because his remedies at law are adequate, the other party should not proceed himself as plaintiff if damages are not an adequate remedy to him. In such circumstances the defendant's rights will be sufficiently protected, since in undertaking the enforcement in specie of one party's contractual obligations a court may also enforce the other party's obligations. Three exceptions to the requirement of mutuality may be noted. First, McCarthy and Stone Ltd v Julian S. Hodge Ltd[9] is authority for the point that the holder of an option to purchase may be able to obtain specific performance even though the other party may have no such right against him. The rationale for such principle is that specific performance could not be obtained prior to the exercise of the option, after which there would be mutuality.
Secondly, an exception arises in connection with the grant of specific performance with compensation. When a decree with compensation is granted the court, exceptionally, does more than simply enforce the agreement between the parties, it enforces an agreement somewhat different than that agreed upon, and compels the

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9. [1971] 2 AllER 973 @ 980.

acceptance of compensation which the parties never agreed to give or receive. Compensation in every case means compensation to the purchaser and not to the vendor. If it is impossible to estimate the amount of compensation, specific performance will be refused. Where the vendor cannot even convey to the purchaser substantially what he contracted to get the remedies are not mutual. In such case the vendor is not entitled to specific performance at all, but the purchaser can elect to take all the vendor is able to convey to him, and have a proportionate abatement of the purchase money[10]. The crux of the matter is that if the vendor had earlier brought proceedings for enforcement, he would not have been able to obtain a decree because of the absence of subject matter of the contract.

A third exception arises when a plaintiff seeks specific performance of a contract required by statute to be evidenced in writing by a person sued upon it. A plaintiff may obtain specific relief even though, not having signed any document, it would be impossible for specific performance to be ordered against him[11]. The defendant could not himself have brought an action and it is argued that there is no mutuality in these circumstances[12]. The explanation

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10. Westmacott v Robins (1862) 4 DeGR&J 390;
Cato v Thompson (1882) 9 QBD 616.

11. Seton v Slade (1802) 7 Ves 265 ;
Morgan v Holford (1852) 1 SM&G 107.

12. Western v Russell (1814) 3 V & B 187;
Boys v Ayerst (1822) 6 Madd 316 ;
Butler v Powis (1845) 2 Coll 156 ;
Ronald v Lalour (1872) 3 VR (E) 98

for the above is that the terms of the statute have been satisfied and that the plaintiff will be treated in equity as having waived his right to object to the lack of a memorandum signed by him if at a later stage of the proceedings a question arises of the enforcement in turn of his own obligations.

The area of mutuality with regard to specific performance in the last decade has only been averted to in one major reported case[13]. It is submitted that while a number of cases had sought to and succeeded in eroding the unduly rigorous exposition of mutuality propounded by Fry, Price v Strange[14] has finally elasticised the principle in line with the overall trend evidenced in equity ; that being away from precedent, and the gloss it has created, and towards particular circumstances and a return to conscience. The above case is worth considering, as while the appellate Court[15] recognised that mutuality was not required at the time of execution of the contract, however the judge at first instance[16] was of the opposite opinion. Clearly the Court of Appeal had to clarify this area in this particular case and also in the area in general.

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13. Price v Strange [1978] Ch 337

14. Supra n. 13.

15. English Court of Appeal ; Buckley, Scarman and Goff LJJ.

16. Thomas J.

Buckley L.J.[17] firmly underlines the thoughts of the court towards the scope of mutuality when he states " I remain of the opinion that considerations of mutuality go to discretion, not to jurisdiction. If lack of mutuality at the date of the contract were to deprive the court of jurisdiction to decree specific performance, I find it difficult to see how subsequent events could confer jurisdiction ; and yet it is clear that a vendor of land, who at the date of the contract of sale has a defective title but subsequently perfects it before the purchaser has repudiated the contract, can sue the purchaser for specific performance".

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17. Supra n. 13 @ 346.

F (i) THE TIME OF MUTUALITY

Mutuality at the date of the contract, though possibly sufficient, is not necessary[1]. Dixon J explained the reasoning for this attitude, as opposed to the approach espoused by Sir Edward Fry[2], in the following manner - "The doctrine of the Court of Chancery was against decreeing one party to perform specifically obligations which the contract imposed upon him, if it was unable to secure to him the performance by the other contracting party of the conditions upon which those obligations depended, and could only leave him to his action of damages at law in the event of the conditions being unperformed"[3]. This statement also suggests that it is not even sufficient that mutuality existed at the date of the contract, if it no longer exists at the time when the decree is made.

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1. South Eastern Rail Co v Knott (1852) 10 Ha 122;
Woods v Wolsey (1891) 12 LR (NSW) Eq 245 ;
O'Regan v White (1919) 2 IR 339 ;
MacAuley v Greater Paramount Theatres Ltd (1921) 22 SR (NSW) 66;
Dougan v Ley (1946) 71 CLR 142;
Joseph v National Magazine Co Ltd [1959] Ch 14 @ 20

2. Fry Specific Performance ; Hawkes v Eastern Counties Ry Co (1852) 1 De G&M&G 737;
Boyd v Ryan (1947) 48 SR (NSW) 163

3. Williamson Ltd v Lukey & Mulholland (1931) 45 CLR 282 @ 298.

More recently Goff J stated that "the true principle is that one judges the defence of want of mutuality on the facts and circumstances as they exist at the hearing"[4]. It follows that often the success of a plaintiff seeking specific relief may depend upon his delaying the commencement or prosecution of prosecution until he has performed such of his obligations as the court will not require to perform in specie or until any other such circumstance which might render the grant of relief unjust has ceased to exist[5].

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4. Price v Strange [1978] Ch 337 @ 357.

5. Spry Equitable Remedies 2nd Ed 94.

G ENFORCEMENT OF TESTAMENTARY DISPOSITIONS

The remedy for breach of contract to leave property by will is normally damages, for any other result would amount to interference with testamentary freedom. There are a number of early cases[1] in this area the most notable being Synge v Synge[2]. In this case the defendant promised he would leave a house and land to the plaintiff, his wife, in consideration for her marrying him. The defendant later conveyed his estate to another person, thereby incapacitating himself from keeping the promise. The plaintiff sued for the recovery of damages. Kay L.J. nevertheless mentioned the assistance which might be sought of a court of equity in such cases -

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1. Hammersley v De Biel 12 Cl & Fin 45 per Lord Lyndhurst L.C. @ 78

" The principle of law, at least of equity, is that - that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he is not disappointed, and will give effect to the proposal. "

2. [1894] 1 QB 466.

" It is argued that Courts of Equity cannot compel a man to make a will. But neither can they compel him to execute a deed. They, however, can decree the heir or divisee in such a case to convey the land to the widow for life, and under the Trustee Act can make a vesting order, or direct that someone shall convey for him if he refuses".[3]

There are other similar decisions in England[4], Canada[5], Australia[6] and New Zealand[7]. In summary these cases indicate that specific

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3. Supra n. 2 @ 471. Also see
Birmingham v Renfrew (1937) 57 CLR 14

4. Loffus v Maw (1862) 3 Giff 592;
Maddison v Alderson (1883) 3 App Las 467;
Coverdale v Eastwood (1872) LR 15 Eq 121;
Williams v Williams (1868) 37 LJ Ch 854;
Re Edwards [1958] Ch 168 ;
Parker v Clark [1960] 1 AllER 93

5. Legeas v Trusts & Guarantee Co (1912) 5 DLR 389;
Barnes v Cunningham [1933] 3 DLR 653 ;
Briese v Dugard [1936] 1 DLR 723 ;
Coyle v McPherson [1944] 2 DLR 591 .

6. Wakeling v Ripely (1951) 515R (NSW) 183;
Jopling v Jopling (1909) 8 CLR 33 ;
O'Sullivan v National Trustees [1913] VLR 173 ;
Re Syme [1933] VLR 282 ; Birmingham v Renfrew (1937) 57 CLR 666

7. Nealon v Public Trustee [1949] NZLR 148;
Public Trustee v Commissioner of Stamp Duty [1951] NZLR 904;
Reynolds v Marshall and Sturmer [1952] NZLR 384

performance may be granted in respect of a promise to leave property by will where the subject matter of the promise is a specific asset[8]. The New Zealand Court of Appeal in Nealon v Public Trustee[9] stated the law of New Zealand in such situations, a statement which governed testamentary cases for a number of decades. All five judges considered that such a claim is enforceable only to the extent that any testamentary provision made is not a fulfilment of the promise, and that the deceased has not otherwise remunerated this claimant. However a claim can only be enforced (i) where the testamentary provision promised was of a stated amount, by an award to the claimant of that amount or of a lesser sum, or (ii) where the testamentary provision promised was of no stated amount, or was to devise reality (defined or not) or to bequeath personal property other than money (and whether described or not), by an award to the claimant of such amount as may be reasonable. Moreover when a court is deciding whether and to what extent the promise is to be enforced, a court should have regard to all the circumstances of the case, and in particular the circumstances in which the promise was made and the services rendered or the work performed, the value of the services or work, the amount of the estate, and the nature and amount of competing claims.

More recently the Privy Council in Schaefer v Schuhmann[10] reaffirmed the principles as set out in Synge v Synge[11] by treating it as

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8. Note that specific performance is of greater value to the promisee if the promisor is insolvent : Dolerit v Rothschild (1824) 1 Sim & St 590.

9. [1949] NZLR 146

10. [1972]AC 572

11. [1894] 1 QB 466.

established that where there is a contract to leave specific property by will, the plaintiff "can obtain a declaration of his right to have it left to him by will and an injunction to restrain the testator from disposing of it in breach of contract".[12] Schaefer v Schuhmann was expressly affirmed by the New Zealand Court of Appeal in Breur v Wright[12a], where in a codicil to his will a testator contracted to forgive a business debt. It was found that a valid and enforceable contract existed[12b].

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12. [1972] AC 572 per Lord Cross of Chelsea @ 580.

12a. [1982] 2 NZLR 77

12b. To be noted that the question purtaining to the validity of the contract was not in issue on appeal. Woodhouse P, McMullin and Ongley JJ concluded with respect to Schaefer's case

" ... we are satisfied that unless and until the Privy Council itself should review its advice in Schaefer v Schuhmann that decision must be regarded as binding on the Courts of New Zealand. "

Ibid 86.

See Generally "Contracts to Make Wills" (1985) 15 VUWLR 164.

However it is well established that specific performance will not be ordered where the person who entered into the contract was merely acting in exercise of a testamentary power of appointment[13]. Further an agreement to make ample provision for a person by will is too vague to be enforced[14] ; a definite intention must be proved in order that relief may be granted[15]. The recent cases of Re Gonin[16] and Wakeham v McKenzie[17] establish that if the property in question is land or an interest in land, the contract is unenforceable unless there is sufficient memorandum or note in writing or part performance.

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13. Re Parkin Hill v Schwarz [1892] 3 Ch 510 ;
Zaiser v Lawley [1902] 2 Ch 799 ;
Robinson v Ommaney (1882) 21 Ch D 780.

14. MacPhail v Torrance (1909) 25 TLR 810.

15. Lord Walpole v Lord Oxford (1797) 3 Ves 402 ;
Re Oldham [1925] Ch 75 ;
Gray v Perpetual Trustee [1928] AC 391

16. [1979] Ch 16.

17. [1968] 2 All ER 783.

Section 3 [18] of the Law Reform (Testamentary Promises) Act 1949 places an added dimension on enforcement of such contracts in New Zealand.

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18. " Where in the administration of the estate of any deceased person a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his lifetime, and the claimant proves an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant, whether or not the provision was to be of a specified amount or was to relate to specified real or personal property, then, subject to the provisions of this Act, the claim shall, to the extent to which the deceased has failed to make that testamentary provision or otherwise remunerate the claimant (whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased), be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services were rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, children, next-of-kin, or otherwise. "

Such section supplements, but does not displace, the pre-existing remedies available in cases where a contract is established[19]. This principle is succinctly stated by Gresson. J in Nealon v Public Trustee[20]: " A claim well founded in contract may be enforced independently of the section." This statement was added to by F.B. Adams. J in Reynolds v Marshall and Von Sturmer[21] where his Honour held that in cases in which the plaintiff is entitled to, and asks for, specific performance, the Court has no discretion, such as is given by the statute, as to the incidence of its order, and is not concerned with its effects on the rights of beneficiaries under the will.
It would appear that the Law Reform (Testamentary Promises) Act 1949 need only be turned to to enforce a testamentary disposition if the same is not expressly stated or contractually quantified.

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19. Nealon v Public Trustee [1949] NZLR 148; Public Trustee v Commissioner of Stamp Duty [1951] NZLR 904; Reynolds v Marshall and Sturmer NZLR 384.[1952]

20. [1949] NZLR 148 @ 166.

21. [1952] NZLR 384.

The above mentioned act is a scheme unique to New Zealand which facilitates the enforcement of testamentary promises which, given the formal contractual rules, are unenforceable, as they lack several of the fundamental elements of a contract. The Act encompasses services rendered or work performed for a deceased in his life time by the claimant[22]. The promise by the deceased to the claimant must be one to reward the claimant by making some testamentary provision for him[23]. However unlike the standard rules as pertain to the majority of contracts the promise may be made either before or after the services were rendered or work performed[24].

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22. Section 3(1) Law Reform (Testamentary Promises) Act 1949. The services and work cover a multitude of tasks e.g. taking maternal grandfather's name Hawkins v Public Trustee [1960] NZLR 305 ; work for deceased's company De la Rue v Day (1979) RL 141. In short the motive for the services is immaterial Jones v Public Trustee [1962] NZLR 363; Moore v Hattaway C.A. 51/83 unreported.

23. Section 3(1) Supra.

24. Section 3(2) Supra.

In this instance past consideration is good consideration. Moreover the promises may be either express or implied[25], thereby circumventing the principles surrounding certainty of contract. But such a promise will not be enforced unless there is a nexus between the promise and the services[26].

The Act provides for an award[27] to be made, so strictly speaking the "contract" is not specifically enforced. The promise in most circumstances does not expressly quantify the consideration and hence the award fixes the quantum a function a decree of specific performance cannot do[28].

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25. Section 3(1) Supra ; Allender v Gordon [1959] NZLR 1026 AC "suitably rewarded" were the words held to constitute a promise. Also Day v Public Trustee [1977] RL 258.

26. Tucker v Guardian Trust [1961] NZLR 773.
Pickup v Perpetual Trustees [1981] RL 120

27. Section 3(1)

28. In considering the quantum of the award the following factors may be considered ;
(a) the circumstances in which the promises were made Wright v Slane (1979) RL 10. (b) The value of the services or work Gartery v Smith [1951] NZLR 105
(c) the amount of the estate Perkins v Mullen CA 115/81
(d) competing claims of other persons De la Laye v Lowe (1976) RL 18.

H CLEAN HANDS

A plaintiff who seeks specific performance must come with clean hands.

The aforementioned maxim contemplates that when a plaintiff whose conduct has been improper in a transaction seeks relief in equity, such relief will be refused. The maxim is linked closely in origin and in application with the maxim he who comes to equity must do equity. It is an historical reflection that courts of equity are courts of conscience.[1]

With regard to specific performance it is submitted that there are two general categories of case pertaining to clean hands.

As to the first category, a plaintiff is said not to come with clean hands if he has not completed all conditions precedent and performed, or at least tendered performance, of all the conditions of the contract, and the plaintiff seeking equity must be prepared to do equity *i.e.* to perform all his future obligations under the contract. In *Australian Hardwood* v *Commissioner for Railways*[2]

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1. Early cases: *Cory* v *Gertcken* (1816) 2 Madd 40 ;
Overton v *Banister* (1884) 3 Hare 503;
Cadman v *Horner* (1810) 18 Ves 10.
More recently: *Harrigan* v *Brown* [1967] 1 NSWLR 342;
Dewhirst v *Edwards* [1983] 1 NSWLR 34;
Dow Securities v *Manufacturing Investments* (1981) 5 ACLR 501

2. [1961] 1 All ER 737

Lord Radcliffe said, and his remarks are applicable to specific performance, that "A plaintiff who asks the court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of interdependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations ... secondly, where the agreement is one which involves continuing or future acts to be performed by the plaintiff, he must fail unless he can show that he is ready and willing on his part to carry out those obligations, which are in fact, part of the consideration for the undertaking of the defendant that the plaintiff seeks to have enforced".[3]

With regard to this statement it is to be noted that it appears too broad in that it does not follow that any breach by a plaintiff disentitles him to specific performance. Sydney Consumers'Milk and Ice Co v Hawksbury Dairy and Ice Co[4] is illustrative of the second portion of Lord Radcliffe's above statement : the portion relating to the principle that a plaintiff must aver and prove that he is ready and willing to perform his own obligations under the contract. So if it appears that the plaintiff as purchaser is ready and willing to pay the purchase price only after making a deduction from it which he is not entitled to make, specific performance will be refused.[5]

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3. [1961] 1 AllER 737 @ 742

4. (1931) 31 SR (NSW) 458.

5. King v Piggioli (1923) 32 CLR 222.

It is established that these principles do not require the plaintiff, in order to succeed in his suit for specific performance, to show that he has in the past strictly and literally complied with all his obligations under the contract, or that he is ready and willing to perform strictly and literally his obligations in the future. The High Court of Australia in Mehmet v Benson[6] explains this principle. In this case the plaintiff was a purchaser of land at Wollongong by virtue of a contract. Payments due by him under the contract were, and had for some years been, substantially in arrears, yet he obtained a decree of specific performance. Barwick C.J. noted that readiness and willingness was a question of "substance" rather than a technical or narrow question. Moreover he must be ready and willing to perform the essential terms as opposed to subsidiary terms.[7] It is not correct to regard a lack of honesty on the part of the plaintiff as a necessary bar to specific relief. For example where a defendant is shown to have waived a right to rescind which arises through the fraud of the plaintiff a court of equity may see fit, in the exercise of its discretion, to award specific performance.[8]

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6. (1965) 113 CLR 295.

7. per Barwick C.J. @ 307 - 8.

8. Nor is it necessarily fatal that the plaintiff asserts a wrong view of the contract which he believes to be correct, provided that the view is not untenable and that the plaintiff is willing to perform the contract according to what transpires to be its true tenor. Thus in Green v Sommerville (1979) 141 CLR 594, the High Court held the principle applied in favour of a plaintiff who had insisted on an oral variation of the contract which the Court determined against her.

Under this general heading of, as we shall call it, "unsavoury behaviour", two categories seem to have formed. The first encompasses instances where the plaintiff is shown to have materially misled the court or to have abused its process or at least to have attempted to do so. In the second, it must generally be established that the grant of the relief which the plaintiff seeks will enable him to achieve a dishonest purpose and that in all the circumstances it appears to the court to be inequitable to grant the particular relief in question.[8a]

Armstrong v Sheppard and Short[9] is illustrative of the principle that specific performance will be refused if the plaintiff is shown to have materially misled the court or to have abused its process. For instance, the intentional uttering of a false account to the court, especially on a material matter, is a consideration inhibiting the decree of specific relief and will be taken into account with such other matters as hardship to the parties.

In the second category of case it can be inferred that the court is being called upon to assist "unsavoury conduct" on the part of the plaintiff. This could see the court being asked to enforce a right already improperly obtained or by furthering the unconscionable purpose of the plaintiff. Hence it was said in Meyers v Casey[10]

" No court of equity will aid a man to derive advantage from his own wrong, and this is really the meaning of the maxim".

8a. Spry "Equitable Remedies" 2nd Ed @ 232.

9. [1959] 2 QB 384.

10. (1913) 17 CLR 90 @ 124

Argyll v Argyll[11] goes on to stress that the undesirable behaviour in question must "involve more than merely a general depravity ; it must be a depravity in a legal as well as a moral sense".[12]
The immediate and necessary relation (i.e. the causative link), has been insisted upon in numerous situations,[13] the most recent New Zealand instance being by Beattie. J in Upper Hutt Arcade v Burrell[14]. In this case specific performance was sought of an agreement to lease. The plaintiff agreed to lease a shop in an arcade to the first defendant, who subsequently assigned his rights to a second defendant. The plaintiff insisted on a guarantee from the first defendant if the lease was to be granted to the second defendant. The lease was executed by the second defendant but no guarantee was given. The second defendant went into possession of the premises, a shop called "Three Coins Gift Shop". The defendants refused to complete on the grounds that the plaintiff was in breach of its obligation to keep the premises weatherproof, and that there was a misrepresentation of the layout of the arcade with particular reference to a fountain, and that the plaintiff did not come with "clean hands" seeking an equitable remedy. With reference to the defence of "clean hands" his Honour held that the damage to the fountain (which was caused by vandals) did not refer to something the plaintiff had done or failed to do over the letting of the shop, nor was there any breach of an express term of the lease. His Honour felt that for the maxim to operate the breach

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11. [1967] Ch 302

12. Supra n.11 @ 331-2

13. Argyll v Argyll Supra n. 11
Hubbard v Vosper [1972] 2 QB 84 @ 101.

14. [1973] 2 NZLR 699.

would have to go to a factor which was the "essence" of the operation carried out[14a]. Hence His Honour further reinforces the principle that the conduct in question must be causative to the relief that is sought.

Such causative theory is illustrated in its extreme by McLelland J in Carlson v Sparkes[15]. By an agreement of sale and purchase Sparkes agreed to sell to Carlson an old cottage for $30,000. The cottage was dilapidated and had not been inhabited for years. The purchaser was entitled to vacant possession on completion. Before settlement the purchaser caused its agents to enter the cottage and demolish it. The vendor purported to terminate the contract, claiming that the purchaser's conduct constituted a fundamental breach and repudiation of the contract. The purchaser claimed specific performance and damages. Not surprisingly the claim for specific performance was resisted on the grounds that the plaintiff's conduct in demolishing the cottage gave rise to a lack of clean hands precluding the grant of equitable relief.

14a. Note the comments of Lord Chelmsford LC in Parker v Taswell (1858) Z De G & J 559

" It must be borne in mind that this agreement has been partly executed by possession having been taken under it ; and there are many authorities to show that in such a case the court will strain its power to enforce a complete performance. "

15. [1981] ANZCR 83

However His Honour held that although the act of demolishing the cottage before completion was a tortious act infringing proprietary rights of the defendant it did not constitute a breach of the contract as such, even given that the contract did not confer any rights prior to completion on the plaintiff to enter the property. Therefore the defendant's proprietary rights as owners remained relatively unimpaired and specific performance was decreed. It is submitted that at first blush the facts of the last cited case appear to provide good grounds for the defence of unclean hands to succeed. The conduct strikes at the subject matter of the contract. But McLelland. J realising the practicality of the situation chooses to disregard the defence. His Honour goes a step further than assessing the subject matter involved and considers the intangible rights associated with the contract[15a]. It is ventured that the learned Judge has used a common sense rather than a strict equitable approach to the problem at hand[15b].

15a. From a purely practical point of view a purchaser can only make alterations or additions, or gain access to the premises, before completion, with the vendor's knowledge and consent. Without this the purchaser is trespassing and is liable for damages.

15b. Such an approach is in keeping with the trend in equity away from inflexibility imposed by case law to a reawakening of base equitable notions.

The Privy Council has delivered the most recent and, it is submitted, the best summary of this maxim in Sang Lee Investments Co Ltd v Wing Kwai Investment Co Ltd[16]. In this case the Judicial Committee was considering an appeal from the Court of Appeal of Hong Kong. In short, a company had contracted to sell land to a purchaser which contracted to sell it to a subpurchaser. The company failed to complete the sale. The subpurchaser brought an action in the High Court against the purchaser. The company was joined as a third party. The High Court ordered specific performance of the contract. The Court of Appeal dismissed the company's appeal[17]. The only issue was whether there was any considerations leading to the refusal of a decree. The company submitted that both the purchaser and the subpurchaser had been guilty of misconduct. Lord Brightman stated that to disentitle a plaintiff to relief the alleged want of probity had to arise in the transaction and had to have an immediate and necessary relation to the equity sued upon. His Lordship then averted to an otherwise uncanvassed area, that being where there are alleged improprieties on both sides. In this instance it was held not to be the proper approach for a court in exercising its discretion to grant specific relief to compare the misconduct on the one side with the misconduct on the other side. His Lordship went on to say that the court should first decide whether there had been any want of faith, honesty or righteous dealing on the part of the person seeking relief and then decide whether as a matter of

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16. ACL [1984] 345
Sol. J (1983) 127 410.

17. Sol. J (1983) 127 410.

discretion and in all the circumstances, which might include any relevant misconduct on the part of the person resisting, if it was right to grant or refuse specific performance. There was no balancing exercise which fell to be performed.

Therefore, it is submitted in summary, to disentitle the plaintiff to equitable relief under the maxim "he who comes to equity must come with clean hands", two conditions must be satisfied. First, the plaintiff's conduct must be wanting in good faith and secondly, it must be in the "transaction" which is the basis of the suit.

In conclusion this discretionary consideration looks at what the plaintiff must be prepared to do now which is right and fair, but also it looks to see that the plaintiff's past record in the transaction is clean[18]. It is to be noted that the maxim is not a licence for the court to require its suitors to have lead blameless lives[19]. The maxim is a flexible instrument of justice, but rules have been developed to limit its possible broad scope. It is submitted this is one area of equity where the balance of case law and conscience have reached a happy equilibrium. We will not see a case of note in this area for a number of years, this point being where case law has applied an excessive layer of gloss to the discretion.

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18. " he who has committed iniquity shall not have equity " Jones v Lenthal (1669) 1 Ch Cas 154

19. Loughran v Loughran 292 US 216 @ 229 (1934)

The comments of Spry best summarise matters : "The general principle of clean hands is doubtless susceptible of fresh application in appropriate circumstances, but care must be taken in not applying it to situations where it has already been held not to apply".[20]

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20. Spry "Equitable Remedies" 2nd Ed @ 232.

I HARDSHIP

" ... another form of oppressiveness which may prevent specific performance ... "

Halsbury's "Laws of England" Vol 44 Para 472

The concept of hardship reflects the quality of conscience that is embodied in all courts of equity. Such a consideration is an appeal to the compassion and the humanity of the Chancellor, he being required to examine this form of oppressiveness which may prevent specific performance, such examination having to reveal great hardship to the defendant[1], so much so that it would be unreasonable and harsh to grant equitable relief[2]. The defence of hardship concentrates principally on the effect of a decree of specific performance on the defendant. However the interests of the plaintiff, as regards the hardship caused by a refusal of the decree, are also examined. The defendant has the onus upon himself. He must show that a decree of specific performance would impose on him a hardship amounting to oppression far outweighing the inconvenience to the plaintiff if he was left to his remedy in damages.[3]

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1. Falcke v Gray (1859) 4 Drew 651 @ 660
2. Wedgewood v Adams (1843) 6 Beav. 600 @ 605;
   Watson v Marston (1853) 4 De G and G 230;
   Eastes v Russ [1914] 1 Ch 468 @ 480.
3. See Spry "Equitable Remedies" 2nd Ed @ 191.

By way of introduction hardship which arises through the defendant's conduct[4] or hardship which is occasioned by the defendant simply because the object that the defendant had in mind when he entered into the agreement has now failed,[5] or because the defendant's speculation has proved unfortunate to him[6], cannot be set up by way of defence to the award of specific performance[7]. In short, the hardship to the defendant must be of substance, be non-self inflicted and contain that intangible quality which brings into play the "compassion" of the Court of Equity.

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4. Storer v Great Western Railway Co (1842) Z Y & C C 48 ; Hawkes v Eastern Counties Ry. Co. (1852) 1 De G & G 737.

5. Morley v Clavering (1860) 29 Beav 84

6. Mountford v Scott [1975] Ch 258.

7. Note Also : Spencer v Daniljchenko [1976] QWN 10. S.C. where a plaintiff seeking performance delayed, forcing the defendant to obtain a bridging loan at a higher rate of interest. Held ; that this was not the sort of hardship a court of equity would consider.
Nicholas v Ingram [1959] NZLR Also :
Francis v Lowcliffe [1976] The Times, March 30 (landlord's financial inability to provide and maintain a lift.)

Hence, there have been numerous instances in which hardship has been found to lie[8]. The number and diversity of these cases illustrates the breadth of this discretionary consideration. It would be idle to consider every case, instead the following principles are proffered as arising from the array of decisions. Firstly, inadequacy of price may be a ground for refusing specific performance if the purchaser stands in a fiduciary position to the vendor, or fraud enters into the contract[9].

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8. Hardship resulting from mistake ; Dell v Beasley [1957] NZLR ; threatened litigation made it impossible to ascertain whom ground rent payable to, and the purchaser would have been involved in immediate litigation ; Pegler v White (1864) 33 Beav. 403 ; hardship if defendant be exposed to prosecution if he forced to perform Pottinger v Genge (1967) 11b CLR 328 @ 337 also Norton v Angus (1926) 38 CLR 523 @ 534 ; hardship if the decree would cause the defendant to incura forfeiture Peacock v Penson (1848) 11 Beav 355, Helling v Lumley (1858) 3 De G & J 493 ; hardship where a vendor cannot perform his contract unless he litigates, particularly if the proceedings would be against his wife, Wroth v Tyler [1974] Ch 30 ; Intoxication on the part of the defendant may suffice Mallins v Freeman (1837) 2 Keen 25 ; ignorance and a mental state not amounting to incapacity may be a defence Jacobs v Bills [1967] NZLR 972.

9. Coles v Trecothick (1804) 9 Ves 234 ;
Sullivan v Jacobs (1828) 1 Moll 472.
Haywood v Cope (1858) 25 Beav 140.

Secondly, in determining how great any such hardship or inconvenience to the plaintiff would be and whether an award of damages would unduly prejudice the plaintiff, actual events and future events as known or foreseen at the date of the order are taken into account, and there is no ad hoc limitation to events which have already taken place at the time the contract was created[10]. Thirdly, if a misconception on the part of the defendant was largely due to the defendant's own innocent mistake, he is estopped from setting up his mistake as preventing the formation of the contract, however where the mistake may have been mutual or induced, sufficient hardship may arise to expand the defence of mistake[11] (the defence of hardship by being a flexible instrument is also capable of extending the other discretionary defences). Fourth, if damages and other legal remedies are inadequate[12] a plaintiff will be presumed to be entitled to specific relief. Therefore, the onus is upon the defendant to show that the hardship suffered by himself far outweighs that which would be suffered by the plaintiff if he was compensated with damages[13].

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10. German v Chapman (1877) 7 Ch D. 271 ;
Burrow v Scammell (1881) 10 Ves 470.

11. Dell v Beasly [1959] NZLR 89;
Keats v Wallis [1956] NZLR 563 ;

12. See Generally Spry "Equitable Remedies" 2nd Ed @ 58.

13. Nicholas v Ingram [1958] NZLR 972 ;
Sutton v Gurdowdg Ltd (1950) 81 CLR 418.

The most recent case under this heading is a remarkable case of hardship as well as providing the latest statement as to the use of the discretionary concept of hardship, that case being Patel v Ali[14]. The circumstances of this case are such that they caused Goulding. J "some anxiety". His Honour felt that the case for the defendant "arouses so much sympathy that I felt for a long time that any exercise of the discretionary jurisdiction in her favour would probably be unfair to her opponents, just because of the force of such sympathy "[15]. The defendant entered into a contract to sell her house to the plaintiff. At the date of execution of the contract, the defendant was a married Pakistani woman aged 23 who spoke little English, and who had one child, and was in good health. Completion of the contract was delayed, but through neither party's fault. In the interim things went disastrously wrong for the defendant. First her husband was adjudicated bankrupt, secondly she was found to have bone cancer and had to have a leg amputated. To make matters worse the defendant gave birth to two children in the space of two years and her husband was sent to prison. Because of her physical disability and her inability to speak English, the defendant relied on her friends who lived in the strong Moslem community in which the house was situated. Notwithstanding the foregoing events, the purchasers sought specific performance of the contract. The defendant's main ground for resisting the decree was that if she was forced to move to another neighbourhood she would be deprived of the daily assistance from her friends and relations that she needed to maintain her family.

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14. [1984] 1 AllER 978.

15. Ibid 980.

Goulding. J first considered the hardship to the plaintiffs if the decree was refused and found that if the decree was refused and adequate pecuniary compensation were available, the hardship to the plaintiff would not be great. This was because there had been a long delay in pursuing the remedy[16].

As to the hardship to the defendant, His Honour felt that "hardship which moves the court to refuse specific performance is either a hardship existing at the date of the contract or a hardship due in some way to the plaintiff". In the case at hand neither of these conditions was satisfied. The plaintiffs relied strongly on a statement in Fry[17] to the effect that subsequent hardship could not be considered. Despite his initial statement, Goulding. J would have none of the plaintiffs' submissions, and refused to lock the court's discretion into a rigid form. His Honour cited City of London v Nash[18] and Webb v Direct London and Portsmouth Rly. Co[19] in support of his view.

Alternatively, the plaintiff argued that in cases where hardship has been argued successfully, the hardship related to the subject matter of the contract and not personal hardship of the defendant. Goulding. J dismissed this argument out of hand.

His Honour concluded by stating that the true principle was that, only in extraordinary and persuasive circumstances can hardship supply an excuse for resisting specific performance.

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16. Ibid 981.

17. Fry "Specific Performance" (6th Ed 1921) paras 417 - 418.

18. (1747) 3 Atk 512.

19. (1852) 1 DeGM & G 521.

The latest New Zealand case involving hardship was decided by Jefferies. J in the High Court at Wellington[20]. To put matters shortly, the Wellington City Council advertised a number of sections to be sold by ballot in the newspapers. The Council had grossly undervalued the properties. The Council had no option but to cancel the ballot. The plaintiffs entered one of the ballots. The plaintiffs asked for a decree of specific performance which, if granted, would result in a ballot being called. Jefferies. J weighed the competing claims, as a court of equity must do, and decided the detriment to the Council would far outweigh the compensation for the plaintiffs. Moreover, to attempt to revive the ballot for the original 240 odd applicants, although technically possible, would, if done fairly, cause further considerable delay. His Honour therefore decided the appropriate remedy was damages[21].

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20. Markholm Construction Ltd v Wellington City Council H.C. Wellington A194/84.

21. Ibid @ 19 - 21.

I (i) TIME OF THE HARDSHIP

The hardship which will constitute a defence to a claim for specific performance must have existed at the date of the contract, save in exceptional circumstances. Thus the court may refuse to enforce an award to arbitration if the submission involves hardship[1], but not on the ground of mere hardship and unreasonableness in the award itself[2]. This approach receives its greatest support from Fry[3]. However the cases relied upon by Fry[4] do not appear to support this proposition, and may be explained on other grounds, such as on the ground that the supervening events have not given rise to a sufficiently great hardship to warrant the refusal of relief[5].

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1. Nickles v Hancock (1855) 7 DeG & M & G 300

2. Wood v Griffith (1818) 1 Swan 43;
   Weekes v Gallard (1869) 18 WR 331.

3. Fry "Specific Performance" 6th Ed @ 199.

4. Revell v Hussey (1813) 2 Ball and B 280 @ 288-9.

5. More recently the view of Fry has been supported by Sholl. J in Bosaid v Andry [1963] VR 465 @ 478 and by Hutchison. J in Nicholas v Ingram [1958]NZLR 972.

But assume an agreement is entered into fairly and after a period of time an event happens which places one party in a better position than another and causes great hardship to one of the parties if a decree is awarded. Surely such hardship should not be ignored. Such a subsequent event should be admissible, with the foreseeability of such events affecting the weight of the hardship[6].
The leading New Zealand case on this point acknowledges that there are exceptional situations where subsequent hardship after the signing of a contract would be considered[7]. It is submitted that this is still too narrow an approach. One should not have to prove extraordinary hardship[8].

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6. Wood v Griffith (1818) 1 Swan 43.

7. Nicholas v Ingram [1958] NZLR Supra n.5
The defendant contemplated at the time of entering into the contract that the transaction would be financed by her husband and son-in-law. However the husband and son-in-law did not yield up the finance. Held: that there was nothing unusual about entering into the contract relying on contingent finance. Hutchison. J considered that mere "financial inability" was not a great hardship.

8. City of London v Nash (1747) 3 Atk 512
Where a covenant to rebuild houses in good condition and repair was not enforced;
Costigan v Hastler (1804) Sch & Lef 159 ;
Webb v Direct London and Portsmouth Rly Co (1852) 1 DeG M & G 521; Cf : Price v Strange [1978] Ch 337.

This requirement is particularly unjust if the change in conditions involving hardship to the defendant has resulted from the act of the plaintiff[9], especially if the plaintiff's conduct operated as something in the nature of a trap.[10]

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9. Davis v Horne (1805) 2 Sch & Lef 341;
Shrewsbury and Birmingham Rly Co v Stour Valley Rly Co (1852) 2 De G M & G 866 ;
Sayers v Collyer (1884) 28 Ch D 103;
Chatsworth Estates Co v Fewell [1931] 1 Ch 224 ;
Duke of Bedford v Trustees of British Museum (1822) 2 My & K 552.

10. Dowson v Solomon (1859) 1 Drew & Sm 1

I (ii) HARDSHIP TO THIRD PARTIES

In some circumstances a court may refuse to grant specific performance on the ground that it would cause hardship to the third person, for example, if it would compel the third person to join in a sale when he had no wish to do so[1]; or would lead to the eviction of the defendant's children from the family home[2].

A court may take account of the fact that there are "third persons so connected with the defendant, that, by reason of some legal or moral duty which he owes them, it would be highly unreasonable for the court actively to prevent the defendant from discharging his duty"[3]. Isaac J in the same case went on to consider the position of a third party who was not in a special relationship with the defendant. His Honour concluded that "hardships of third persons entirely unconnected with the property are immaterial"[4]. It is submitted, in light of recent authorities, that the decision in the above case would not stand if it was reassessed today. In that case[5] a father entered into a contract

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1. Watts v Spence [1976] Ch 165
   Cedar Holdings v Green [1979] 3 AllER 117
   Williams and Glyn's Bank Ltd v Boland [1980] 2 AllER 408.

2. Wroth v Tyler [1973] 1 AllER 897.

3. Gall v Mitchell (1924) 35 CLR 222 @ 230-1.

4. Supra n. 3 @ 230-1.

5. Gall v Mitchell Supra n. 3

to dispose of land which was partly his own and partly his childrens. Specific performance was awarded against the father in respect of the land which he was competent in convey, with compensation in respect of the children's land which he had no authority to transfer.

The defence of hardship to a third party (the children) was rejected, it being argued that the children's land could not be worked as profitably as it had been unless it was worked in conjunction with the father's land. It is submitted with respect that the court should have adverted to the fact that the two types of land (i.e. the children's land and the father's land) formed a single unit and by splitting the land in two the court may have taken the fairest yet the least practical solution. Possibly either the plaintiff should have obtained all the land, or the plaintiff should have received damages in lieu.

Spry[6] finds the principle in Gall v Mitchell[7] untenable. The author argues that a court of equity should not close its eyes to hardship or injury, merely because the person who may be injured is not a party to the proceedings. Spry feels that even the existence of a special duty should not be required as a pre-requisite before considering hardship to third parties[8].

What amounts to a special duty? The most common "special duty" arises where one of the parties to the contract is a trustee. Hardship to any beneficiary of such trust may be taken into account, especially if

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6. Spry "Equitable Remedies" 2nd Ed 192.

7. Supra n. 3

8. Miller v Jackson [1977] QB 966.

a breach of a fiduciary duty is involved[9]. It is clear, therefore, that hardship to third parties, who are in a fiduciary relationship to the defendant, is a consideration. Assuming this is the strict principle of law, which is denied, the increased breadth of trusts[10] will increase the third parties who are to be considered. Moreover by finding a casual link between the defendant and the third party by reason of a duty of utmost good faith[11], the scope of the consideration may be extended. Unfortunately this link is of a contractual nature as demonstrated by Goulding. J in Patel v Ali[12]. In this case the defendant's counsel used an obiter passage from Gall v Mitchell[13] to stress that the defendant's three children were interested third parties and that such hardship to them should not be overlooked. However His Honour did not take into account the welfare of the defendant's children.

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9. Colyton Investments Pty Ltd v McSorley (1962) 107 CLR 177 @ 185 " as against a person selling in a fiduciary capacity specific performance will not be decreed of a contract which the beneficiary may be entitled to complain. See generally Spry, "Equitable Remedies" 2nd Ed 146 ff.

10. Hayward v Giordani [1983] NZLR 247

11. Uberri mae fidei.

12. [1984] 1 AllER 978.

13. Supra n. 3.

The authors of "Equity Doctrines and Remedies"[14], while sympathising with the abovestated view of Spry[15], that all third parties interested in the property should be taken account of, consider that this is an extreme view. Reliance is placed on the statements of Lord Langdale in Thomas v Dering[16]. In that case Sir Edward Dering contracted to sell a piece of land. However he had only a life interest in the land and there were ultimate remainder men alive. Specific performance was refused, one of the grounds being that there was hardship to the third parties. Lord Langdale put it in the following terms : " I apprehend that, upon the general principle that the court will not execute a contract, the performance of which ....would be prejudicial to persons interested in the property, but not parties to the contract, the court, before directing the partial execution of the contract by ordering the limited interest of the vendor to be conveyed, ought to consider how that proceeding may affect the interests of those who are entitled to the estate, subject to the limited interest of the vendor"[17]. While this line of principle brings one back into the sphere of "special duties or relationships", a defendant is still left wondering what an "interest in the property" is. It is ventured that if there is a

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14. Gummow Meagher and Lehane "Equity Doctrines and Remedies" @ para 2022.

15. Supra @ P.

16. (1837) 1 Keen 729.

17. Supra n. 16 @ 747.

fiduciary duty to account for the property then hardship is to be considered. However if the fiduciary duty does not extend to the actual property, by reason of the abovestated cases, the hardship is not to be explored. Possibly a fairer approach would, in the last instance, be to consider the hardship but attach less significance to it.

As to weight, it does not follow that the position of third parties will always be found to be of decisive weight ; questions of weight depend upon the special circumstances of each case, in particular upon the probable nature and extent of the hardship which is in question[18]. Moreover it is also clear that courts of equity will, if necessary, mould their orders or render them conditional, in order that third parties may not be unduly prejudiced. (Aristoc Industries Pty Ltd v R.A. Wenham (Builders)[19])

As with the other equitable defences if the hardship to the plaintiff, generated by the refusal of specific performance, is equal to or outweighs that of the third party, the defence will not stand.

It is submitted that hardship to third parties manifests itself most realistically in the "matrimonial cases"[20]. Assume that a husband is on the title of the matrimonial home by himself. There are domestic difficulties and the wife's solicitor for some unknown reason does not place a Matrimonial Property Act Notice on the title[21]. Prima Facia the wife is entitled to a half share of the matrimonial home upon division[22].

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18. Raphael v Thames Valley Railway Co (1867) LR 2 Ch 147

19. [1965] NSWR 581.

20. Watts v Spence [1975] 2 All ER 528;
Cedar Holdings v Green [1979] 3 AllER 117
Williams and Glyns Bank v Boland [1980] 2 AllER 408.

21. Section 42 Matrimonial Property Act 1976.

22. Section 8 Matrimonial Property Act 1976.

Further assume the husband sells the house to a bona fide purchaser for value who does not realise the wife's interest in the house[23]. Given then greatly increased likelihood that the share of the wife will be fifty percent[24], and given that the innocent party has little redress under the Act[25], it is submitted that the transferring of a spouse's interest against his or her will is a hardship on a third party which would operate to avoid a decree of specific performance. It could be argued that this is not a true third party situation, as the "innocent" spouse "owns" the property co-jointly with the spouse who is attempting to dispose of it.

In New Zealand, while there have been no reported cases, involving these facts, the scope and breadth of the Matrimonial Property Act 1976 as a piece of social legislation suggests that unless sufficient compensation can be guaranteed the third party, the very fundamentals of the Act will dictate that hardship is abundant and that specific performance should not be granted. Further to this, it has recently

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23. Thereby excluding the operation of the "claw back sections of the Matrimonial Property Act 1976 i.e. Sections 44, 45.

24. By reason of the 1963 Matrimonial Property Act a wife's share would normally be far below fifty percent because of the type of contribution examined.

25. Possibly compensation for the disposal of matrimonial property after separation by reason of Section 9 (4) of the Matrimonial Property Act 1976 ; on an adjustment in the valuation date under Section 2 (2) to take account of post separation decreases in value.

been re-emphasised by the legislature that the interests of the children of a marriage are a singly weighty factor with regard to matrimonial matters[26]. The children of a marriage, while not having a vested interest in the property, are therefore in a true third party situation. It is submitted that the view taken by Goulding. J in Patel v Ali[27], as regards the interests of the children of the marriage, reflects without direct consideration the enlightened matrimonial laws which New Zealand is governed by. This statement must be qualified by acknowledging that Patel v Ali[28] was not a matrimonial case as such.

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26. 1983 Matrimonial Property Amendment Act.

27. [1984] 1 All ER 978.

28. Ibid.

J

UNFAIRNESS

" The court's discretion to grant specific performance is not exercised if the contract is not equal and fair. "

Halsbury's "Laws of England" Vol 44 Para 466.

On many occasions, though there are no circumstances that amount to fraud, there is nevertheless a want of equality and fairness[1] in the contract or in the situation surrounding it[2], such qualities being essential in order that the court may exercise its discretionary jurisdiction in specific performance[3]. If a decree for specific relief is refused on the ground of unfairness, a plaintiff will still have the opportunity to claim damages.[4]

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1. "Equal and Fair" Lord Walpole v Lord Oxford (1797) 3 Ves 402
   Rees v Marquis of Bute [1916] 2 Ch 64

2. Oral evidence is admissible to show unfairness depending not on the terms of the contract but on extrinsic circumstances : Davis v Symonds (1787) 1 Cox Eq Cas 402.

3. Blomley v Ryan (1956) 99 CLR 362 @ 401-2 per Fullagar. J:
   " Equity traditionally looked at the matter rather from the point of view of the party seeking to enforce the contract and was minded to enquire whether, having regard to all the circumstances, it was consistent with equity and good conscience that he should be allowed to enforce it. "

4. Twining v Morrice (1788) 2 BroCC 326
   Wilan v Wilan (1810) 16 Ves 72

The rationale behind the defence of unfairness does not rest on the proposition that the contract about to be enforced on the defendant will go hard and be unfair on the defendant, in the colloquial sense. Hence by establishing inadequacy of consideration[4a], a defendant will not have made out a case for the consideration of unfairness to be invoked. Moreover in businesslike terms, as with inadequacy of consideration, while not of itself a ground for resisting enforcement, may be a factor contributing to a final finding of unfairness.
A court of equity will not decree specific performance of an agreement more favourable to the plaintiff than the defendant, involving hardship upon the defendant and damage to his property if he entered into it without advice or assistance, and there is reasonable ground for doubting whether he entered into it with a knowledge and understanding

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4a. Early authorities considered that inadequacy of consideration was in itself a defence to specific performance. Savile v Squile (1721) 1 P WSM 745; Day v Newman (1788) 2 Cox Eq Cas 77 ; Tilly v Peers (1791) cited 10 Ves @ 301; Vaughan v Thomas (1783) 1 Bro C.C. 556. Only if the inadequacy is so gross as to amount to fraud or there are other circumstances which combined with the inadequacy, will induce the court not to enforce the contract, will the court refuse specific performance : Axelsen v O'Brien (1949) 80 CLR 219; Blomley v Ryan (1956) 99 CLR 362
Cf: Abbott v Sworder (1852) 4 DeG & Sm 448, the excessive price to be paid by the purchaser (5,000 for an estate of 3,500) was held to be no defence to an action by the vendor.

of its nature and its consequences[5]. A similar fact situation arose in Richardson v Otto[6] in which the Queensland Supreme Court went so far as to say that there was an unconscionable bargain.[7] Moreover absence of legal advice where the vendors sign a contract for sale, without professional advice and assistance, and the purchaser is a solicitor, circumstances of evidence, generally leading to the notion of surprise, mistake or sharp practise, will be sufficient to induce the court to withold a decree.[8] However there have been situations where specific performance was decreed in favour of a plaintiff though no solicitor acted for the defendant, and though the contract was executed under circumstances which might easily have led to fraud[9].

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5. Vivers v Tuck (1863) 1 Moo P.C. Ns 516.

6. [1938] QWN 15.

7. See Weily v Williams (1895) 16 LR (NSW) Eq 190; paralytic entering into a contract at a great overvalue decree refused ; Jericho v Guglielmin [1938] SASR 292, foreigner at disadvantage decree refused.

8. Deardon v Bamford (1841) 10 LJ Eq 54
Blackney v Bagott (1829) 3 Bl NS 237

9. Lightfoot v Heron (1839) 3 Y & C Ex 586

Underlying the consideration of fairness is the principle that there is a great difference between the right to bring an action for breach of contract, and the right to bring a suit for specific performance. In the latter case the plaintiff must show a fair, clear, and conscientious case, and not attempt to get the benefit of a contract snatched by surprise.[1]

Inadequacy of consideration, while never of itself a gound for resisting enforcement[2], will often be a critical element in cases of this type. It may be important in two ways, first, as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion. Lord Eldon in 1804 stated that "unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance[3]".

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1. Rawlings v Hislop (1883) 9 VLR (Eq) 25

2. Blomley v Ryan (1956) 99 CLR 362
   Unfairness is unfair, or unconscionable conduct on the part of the plaintiff; inadequate consideration or unbusinesslike terms may be evidence of, but do not constitute, unfairness.

3. Coles v Trecothick (1804) 9 Ves 234 @ 246
   See also Abbott v Sworder (1852) 4 DeG & Sm 488, Goldsbrough Mort v Quinn (1910) 10 CLR 674.

There is a well developed jurisdiction in equity, independent of the principles as to undue influence, to set aside unconscientious bargains.[1] This jurisdiction is a branch of the general equitable jurisdiction in fraud. It is raised whenever one party to a transaction is at a special disadvantage in dealing with the other party because distress,[2] lack of advice,[3] illness,[4] ignorance,[5] intoxication,[6] impaired faculties or

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1. Mortlock v Buller (1804) 10 Ves 292;
   Pateman v Pay (1974) 232 Estate Gazette 457;
   Harrop v Thompson [1975] 1 WLR 545

2. Johnson v Nott (1684) 1 Vern 271;
   Kemeys v Hansard (1815) CoopG 125

3. Helsham v Langley (1841) 1 Y and C Ch Cas 175;
   Vivers v Tuck (1863) 1 Moo PCCNS 516;
   See however Lightfoot v Heron (1839) 3 Y and C Ex 586 which notes that mere want of legal advice is not enough.

4. Gartside v Isherwood (1873) 1 BroCC 558;
   Broughton v Snook [1938] 1 All ER 411

5. Clark v Malpas (1862) 4 De G F & J 401;
   Johnson v Buttress (1936) 56 CLR 113.

6. Nagle v Baylor (1842) 3 Dr &War60 ;
   Cox v Smith (1868) 19 LT 517;
   Lightfoot v Heron (1839) 37 and C Ex 586.

financial need or other circumstances[7] affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands[8]. The essence of these situations is (i) parties who meet on unequal terms (ii) the stronger party takes advantage of this (iii) to obtain a beneficial bargain. If such a bargain is evidenced the contract may be set aside. Therefore there is no need to pursue a defence to specific performance as there is nothing to perform. However, if the evidence is not conclusive enough to support the full-blown concept of unconscionable bargain, therefore there is a contract which is capable of performance. A different category is entered into with regard to the unconscionableness of a transaction in relation to the defence of fairness. One obvious question arises between the two classes, is the test or standard of unconscionableness any lower than that applied at the first level of investigation?

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7. With regard to the circumstances, the burden of proof lies on the party against whom specific performance is sought, to establish the circumstances.
Broughton v Snook [1938] Ch 505.

8. Blomley v Ryan (1956) 99 CLR 362
The court will not grant specific performance if the plaintiff knew of the defendant's incapacity
Denny v Hancock (1870) 6 Ch App 1; It need not be shown that the plaintiff was guilty of intentional fairness
Mortlock v Buller (1804) 10 Ves 292.

In partial answer to this question McMullin. J in Archer v Cutler[9] had cause to state the law applicable to unconscionable bargain as it stands in New Zealand. His Honour felt that the following factors while not being singularly determinative of an issue were in various combinations good evidence of an unconscionable bargain. Those factors being ; the plaintiff's knowledge of the defendant's unsoundness of mind or eccentricity, the defendant's lack of advice, the defendant's disadvantageous bargaining position, the sale was at an undervalue.

McMullin. J indirectly alluded to a major importance of having a contract set aside by the equitable principles of unconscionable bargain rather than having to rely on the discretion to refuse specific performance when he said "I uphold the defence .... of unconscionable bargain. Accordingly the plaintiff cannot succeed in his claim for specific performance or damages. " The point being, that if the contract is overturned completely there is no right to damages.

In light of this, it is ventured that the test for unconscionability of bargain with regard to the discretion is a less rigorous standard, as a plaintiff is always left with his remedy in damages, if the court so decides.

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9. [1980] 1 NZLR 386

McMullin. J echoes his above comments in O'Connor v Hart[10] - "Unconscionability as a separate ground for avoiding a contract is a somewhat amorphous concept. Its metes and bounds are not defined. "[11] Possibly the case which crystallizes the standard of unconscionable bargain as regards the discretion is Cain v Layfield[12], a decision of the Supreme Court of New South Wales. Mr Layfield was 92 years old. He grazed 1,619 acres of land. At 92 he felt he was too old to work and so decided to sell the property and retire. A real estate agent interested three purchasers in the property, who would buy a third each. Instructions for the preparation of contracts were given to Mr Layfield's solicitor who also acted for the purchasers. Mr Layfield signed the contracts which contained some blanks, which the solicitor filled out later. Mr Layfield suddenly decided not to sell because he said "he was sick at the time and did not know that the contracts that he was signing were binding contracts of sale. " Rath. J extensively reviewed the evidence, and held that Mr Layfield had sufficient mental capacity and that the sale was at a gross undervalue. It is submitted, that in light of the solicitor's compromising position, the age of the vendor and the sickness of the vendor (sickness given his age) that Rath. J should have refused specific performance. Moreover His Honour appears to have applied the general standard of unconscionable bargain to this case rather than considering all the factors at hand and doing so on a lesser scale in view of the fact that

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10. [1983] NZLR 280

11. per McMullin. J Ibid 290.
Archer v Cutler Supra is expressly approved on this point.

12. ANZCR [1983] 180

His Honour was asked to decide upon specific performance. In support of this view, specific performance was refused in Galloway v Pedersen[13] where an agent acted on behalf of both parties, albeit without the full knowledge of one of the parties.

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13. Galloway v Pedersen (1915) 34 NZLR 513

J (i) THE TIME AT WHICH UNFAIRNESS MUST BE DETERMINED

As a general rule, the question of unfairness must be determined as at the date of the making of the contract,[1] and matters which occurred before such date may be considered.[2] Subsequent events are, in general, irrelevant, for the fact that events uncertain at the time of entering the contract, may afterwards proceed in a direction as yet contemplated by one or both[3] of the parties is no reason for holding the contract to be unfair. Thus, for example, a family arrangement or other compromise is fair if entered into by both parties who have equal knowledge, and who contract in view of some future and uncertain event or the future ascertainment of facts past but unknown.[4]

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1. Revell v Hussey (1813) 2 Ball & B 280.
   Lawder v Blanchford (1815) Beat 522
2. Gummow Meagher & Lehane "Equity Doctrines & Remedies" @ Para 2020.
3. If the deviation from the terms of the contract is of the correct magnitude the contract may be absolutely frustrated. Moreover frustration and impossibility are equitable defences to a decree for specific performance. It is trite that one of the underlying rationale behind these defences is that it would be unfair to enforce a contract where performance was impossible or frustrated. Generally see Spry "Equitable Remedies" @ 117 ff.
4. Lawton v Campion (1854) 18 Beav 87 ;
   Pickering v Pickering (1839) 2 Beav 31;

Subsequent events will be a ground for refusing specific relief, but in these cases they will fall under the discretionary headings of illegality, impossibility or hardship, for example.
The authority for the above propositions is dated. Given the movement, during the last eighty years towards the use of discretions and a breaking away from the slavish following of precedent coupled with the emergence, in New Zealand,[5] of the doctrine of unjust enrichment,[6] it is ventured that subsequent unfairness should be considered when considering the discretionary defence of unfairness. Such post contractual unfairness could be envisaged in a situation where the actual facts are such as to render what is sold worthless, and are known to one party but not to the other, the contract will not be enforced, even if it expressly deals with uncertainty.[7] There is

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5. Hayward v Giordani [1983] NZLR 247

6. A plaintiff would be unjustly enriched if he was allowed to enforce a contract which subsequently had become advantageous to him and disadvantageous to the defendant, if such advantage had been contrived by the plaintiff or if the plaintiff had of turned a blind eye to factors leading to such an advantage (there could well be an overlap with the discretionary consideration of non-disclosure here).

7. Smith v Harrison (1857) 26 LJCh 412.

also authority for the proposition that if the contingency is outside the contemplation of the parties, and different in kind and degree from such uncertainty[7a] as the parties contemplated, the court may refuse specific performance even though the contract is not discharged at law.[8]

7a. With regard to this term "uncertainty" it should be remembered that questions of hardship or unfairness must be judged with close attention not only to the knowledge of the parties .... but also with reference to their intentions, for it may appear from the terms of the contract that it was deliberately entered into in order to settle some doubtful or uncertain question. In some instances a misapprehension may arise which is outside the uncertainty which the contract was intended to resolve :
See Spry "Equitable Remedies" 2nd Ed @ 178. As to uncertainty being a ground for refusing specific performance see the judgment of Sinclair. J in Healey v Jacobson (H/C Auckland A216/85) where the contract was so uncertain, incomplete and obscure that a decree was refused.

8. Baxendale v Seale (1855) 19 Beav 601
Davis v Shepherd (1866) 1 Ch App 410.

Price v Strange[9] provides a recent illustration of subsequent unfairness being considered. In that case unfairness and impropriety in the valuation of a third person, where under the contract the price was to be fixed by that person, was alluded to. However it was noted that such instances would be rare.

In summary it is felt that while subsequent events may prima facia not appear to be relevant to the investigation of unfairness, depending on the facts of any given case, a court has a discretion whether to consider such events or not. The degree of surprise and the actions of the plaintiff determining the weight to be given to the unfairness.

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9. (1978) Ch 338

J (ii) FAIRNESS AND THIRD PARTIES

A species of unfairness which may stay the hand of the court is that the contract, if enforced would be injurious to third persons,[1] including members of the public,[2] or would involve a breach of trust,[3] or a breach of a prior contract with a third person,[4] or would compel the defendant to do an act which he is not lawfully competent to do,

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1. Thomas v Dering (1837) 1 Keen 729
McKewan v Sanderson (1875) L R 20 Eq 65

2. Miller v Jackson [1977] 3 All ER 338
(in this case an injunction was refused due to public interest in the protection of the environment.)
Verrall v Great Yarmouth Borough Council [1980] 1 All ER 839, where specific performance of a licence to occupy a hall was granted to a controversial political group.

3. Byrne v Acton (1721) 1 Bro Parl Cas 186;
Briggs v Parsole [1937] 3 All ER 831 ;
where there is an innocent breach of trust which has been committed as the result of a contract, the court may nevertheless enforce the contract by making the other party carry out his part of the bargain.

4. Willmott v Barber (1880) 15 Ch D 96;
Manchester Ship Canal Co v Manchester Racecourse Co [1900] 2 Ch 352.

or would involve a gross breach of duty as between principal and agent. Of value in this area is the case of Philegan & Co Pty Ltd v Blacktown Municipal Council[5] which considers not only third parties but also inadequacy of consideration. Blacktown Municipal Council entered into a contract to sell land to a company by accepting its offer of $5,000. There was evidence that the value of the land was $30,000. It was claimed that the land had been sold at such a gross undervalue that the ratepayers would suffer a substantial financial loss, if the contract were enforced against the council. The purchaser dealt with the council at arms length and there was no evidence that it was aware or had reason to suppose that the Council would be acting under any disadvantage in considering the offer. Holland. J averted to the principle that inadequacy of price is not of itself, apart from considerations of fraud, a sufficient ground for refusal of specific performance of a contract for the sale of land. Secondly His Honour felt that the relationship between a Municipal Council and its ratepayers is not one of those relationships between a contracting party and third persons such that the hardship occasioned to the third person by reason of the inadequacy of the price payable for the land is a matter to be taken into account in favour of refusing a decree. And finally as it had not been shown that the purchaser was aware of or had good grounds for suspecting that the council had been at a disadvantage in considering the matter, the inadequacy of the price in the present case coupled with the disadvantage and unequal bargaining position of the council in concluding the contract was not a ground for refusing the decree.

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5. (1974) 29 LGRA 231.

In conclusion, fairness along with "clean hands" and hardship is still decided given the circumstances of each individual case. This defence provides the purest form of "conscience justice". While instances of decrees being refused for unfairness alone are in the minority, the concept will often be the straw that breaks the Chancellor's back, when considered in addition to other defences.

K MISTAKE

It may be found that although there is a valid and enforceable contract at law, one or both of the parties has a right in equity to have it rescinded or cancelled, due to circumstances arising out of a mistake. In such cases there is sometimes said to be equitable mistake.[1] The principles on which relief of this nature is granted have for some years been unsettled with conflict existing between the authorities.[1a] To some extent these difficulties are due to the fact that for many years there was confusion as to the effect of "legal mistake" or mistake such as to prevent the existence of an agreement enforceable at common law.[1b]

The mistake may be of such a nature to preclude the consensus ad idem which is required in every contract, and so render the seeming contract no contract at all. Such a mistake is now regulated by the Contractual Mistakes Act 1977.[1c] Where such a "mistake" exists

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1. Generally Williston on Contracts 3rd Ed (1970) @ 1537.

1a. The subjective theory: Smith v Hughes (1871) LR 6 QB 597; Williams "Vendor and Purchaser" 4th Ed (1936) 748; Bell v Lever Brothers Ltd [1932] AC 161 Solle v Butcher [1950] 1 KB 671 McRae v Commonwealth Disposals Commission (1951) 84 CLR 377 Svanios v McNamara (1956) 96 CLR 186.

1b. See n. 1a above.

1c. Generally see: McCullough v McGrath's Stock & Poultry [1981] 2 NZLR 428; note that this case as to its ratio was overuled by the Court of Appeal in Ozzolins v Conlon CA 16/83.

there is no contract, and there can be no damages and no specific performance.

The court in certain circumstances will refuse specific performance in which there has been a mistake on the part of the defendant, even where the error is that of the defendant only and even when it has not been contributed to by the plaintiff. So in Clarke v Byrne[1d] a vendor was refused specific performance, although there was no deception by him, as there was a mistake by the purchaser as to the land purchased.[2] Where a mistake is entirely that of the defendant, the courts are much more reluctant to refuse specific performance, and have done so generally only in cases "where a hardship amounting to injustice would have been inflicted upon the defendant by holding him to his bargain and it was not reasonable to hold him to it."[3] In Slee v Wark[4] the High Court of

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1d. (1872) 3 VR (E) 56, 19 Aus D 39.

2. Also: Neild v Davidson (1890) LR 11 209.

3. Tamplin v James (1879) 15 Ch D 215 @ 221 per James LJ. This case 2 blocks of land; on one, a parcel of 20 perches, there stood a hotel and the other block adjoined it and had for some years been occupied by the proprietors of the hotel. The only land sold under the contract was the parcel on which the hotel stood. The purchaser, however, thought that he was buying both parcels and sought to resist specific performance on the ground of that mistake. The Court rejected the defence and granted the decree.

4. (1949) 86 CLR 271.

Australia said that where there was a unilateral mistake on the part of the defendant not contributed to by the plaintiff, the question whether the court should decree specific performance or leave the plaintiff to sue for damages must depend on the circumstances of the particular case ; but the general rule governing the exercise of that discretion was laid down by James L.J. in Tamplin v James.[5a] Lord McNaughton in Stewart v Kennedy [5b] has said that it cannot be disputed that a unilateral mistake by the defendant may be a good defence to a specific performance action, though most of such cases have been cases where a hardship amounting to injustice would have been inflicted upon the defendant.[5c] In Fragomeni v Fogliani[6] the High Court of Australia upheld a decree of specific performance in a case where the vendor alleged by way of defence that he had made a mistake as to the price to which he was committing himself.

5a. (1879) 15 Ch D 215.

5b. (1890) 15 App Cas 75.

5c. Wycombe Rly Co v Donnington Hospital (1866) 1 Ch App 268;
Tamplin v James (1880) 15 Ch D 215;
Burrow v Scammell (1881) 19 Ch D 175
contrast Riverplate Properties Ltd v Paul [1974] 2 All ER 656.

6. (1968) 42 ALJR 263 @ 263.

Barwick C.J said at 263 : "... there has been no finding by the trial judge that to order specific performance would be a hardship upon the defendant and for my part I can see no material in the case upon which it ought to be found that there would be any such hardship. Accordingly, at best it is a case of a unilateral mistake not precluding the formation of a contract and no hardship in ordering specific performance as distinct from merely awarding damages. "

Mistake may be a defence to specific performance even where there has been a mistake in a popular rather than a technical sense. This does not allow a man to be careless in entering into a contract, and then avoid liability simply by alleging or even proving that he did so under a mistake,[7] for to allow this would open the door for perjury and fraud. If, however, the defendant can establish that he made a bona fide mistake, it may well be thought inequitable to grant a decree. Obviously, this is likely to be the case where the plaintiff has contributed to the defendant's mistake,[8] even though unintentionally.[9] It has been judicially suggested that some of these cases have gone too far. Malins v Freeman[10] may perhaps be one of those cases, where

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7. Swaisland v Dearsley (1861) 29 Beav 430;
Goddard v Jefferys (1881) 51 LJ Ch 57.

8. Moxey v Bigwood (1862) 4 DeG F & J 351

9. Bray v Briggs (1872) 26 LT 817.

10. (1837) 2 Ke 25.

specific performance was refused against a purchaser, whose agent had mistakenly bid for the wrong property, the mistake being an unreasonable one not in any way contributed to by the vendor. Mistakes have been held to be reasonable and specific performance refused, where it was caused by some ambiguity, even though the defendant was the author of the ambiguity.[11]

Where there is no error in the terms of the contract or in the contractual intention, and there is no difficulty in the way of the vendor performing the contract, according to its terms, or where such performance does not involve the conveyance of the property, which the defendant did not intend to sell, the court in the exercise of its discretion in considering hardship will consider hardship to both sides.[12] In Keats v Wallis[13] the vendor believed that the land,

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11. Douglas v Baynes [1908] AC 477
Webster v Cecil (1861) 30 Beav 62
Moreover a case may also arise for refusing specific performance where through the ignorance, neglect or error of the vendor's agent, property not intended to be sold is included in the sale:
Re Hare and O'More's Contract [1901] 1 Ch 93

12. Keats v Wallis 1953 NZLR 563

13. Contrast this with Watson v Burton (1957) 1 WLR 19.

intended to be sold had less acreage than its true acreage, and the purchaser believed it to have the true acreage, but did not know that the vendor believed it contained less and did not in any way contribute to the vendor's mistake. It was held by Cooke. J that a court of equity, in its discretion, will not refuse specific performance in the case of a mistake such as occured in the case at hand, except perhaps hardship would be caused by holding the defendant to his bargain ; and in such cases it is necessary to consider the hardship to the plaintiff as well.[14]

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14. Contrast this approach with Watson v Burton (1957) 1 WLR 19

K (i) MISCELLANEOUS CONSIDERATIONS

Parol evidence is admissible to prove the mistake despite the statutory requirement[1] of evidence in writing, for the statute does not make a written agreement more binding than it was before the passing of the statute.[2] It does not say that a written agreement shall bind, but that an unwritten agreement shall not bind.[3] This parol evidence rule is in keeping with the flexible discretionary approach applied by the courts of equity when considering specific performance. Where the mistake occurs not in the formation of the contract but in its reduction into writing, the defendant can always set up the error as a defence; he must produce evidence to show that on account of the mistake the agreement as written does not represent the real agreement between himself and the plaintiff.[4]

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1. Statute of Frauds (1677) S. 4.

2. Craddock Brothers v Hunt [1923] 2 Ch 136
United States of America v Motor Trucks Ltd [1924] AC 196.

3. Clinan v Cooke (1802) 1 Sch & Lef 22 @ 39
per Lord Redesdale L.C.

4. Clark v Barnes [1929] 2 Ch 368
Joynes v Statham (1746) 3 Atk 388; where an action was brought for the specific performance of an agreement to grant a least at a rent of 9 per annum, evidence was admitted to prove that it ought to have been a term of the agreement as recorded that the plaintiff should pay all taxes.

Where a mistake in the writing is proved, the court may either dismiss the plaintiff's action or grant specific performance, taking care that the real contract is carried into effect.[5]
Before the Judicature Act 1873 it appears to have been settled that except in a few cases the plaintiff in an action for specific performance could not allege that the written memorandum of the contract did not represent the true agreement, and claim to have specific performance of the true agreement.[6] But the court is now required to grant to the parties in one action all the relief to which they are entitled, hence there is jurisdiction to rectify an agreement and in the same action or specific performance of the document as rectified.[7]

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5. Which course the court will adopt depends upon the particular circumstances of each case;
London and Birmingham Rly v Winter (1840) Ci and Ph 57,
Smith v Wheatcroft (1878) 9 Ch D 223.

6. See Woallam v Hearn (1802) 7 Ves 211,
Martin v Pycroft (1852) 2 DeG M & G 785
Marquis Townsend v Strangegroom (1801) 6 Ves 328.

7. Nolan v Graves [1946] IR 376
Craddock Brothers v Hunt [1923]2 Ch 136
U.S.A. v Motor Trucks Ltd [1924] AC 196 following
Olley v Fisher (1886) 34 Ch D 347.

Where the error or misunderstanding has been brought about or induced by the plaintiff, the plaintiff may sometimes, through an estoppel, be prevented from denying the terms of the agreement are the terms which were understood by the defendant. In such circumstances the defendant himself may be entitled, in appropriate circumstances, to obtain specific performance of the contract as understood by him.[8]
Also of note is the fact that a vendor who claims specific performance of a written contract for sale and insists upon a mistaken interpretation of the contract down to and at the trial, does not thereby forfeit his right to elect to have specific performance of the contract as rightly interpreted, the purchaser's offer, contained in his defence, to complete on those terms not having been withdrawn.
Accordingly, it is too late for a purchaser, who in his defence to an action by the vendor for specific performance has pleaded that he was willing to complete on the right interpretation of the contract, to seek at the trial to amend that offer and ask for rescission and recovery of his deposit, on the ground that the vendor by his conduct in insisting upon a wrong interpretation had repudiated the contract and had thereby given the defendant purchaser the option to accept the repudiation.[9]
In considering the defence the courts will take account of any error or misapprehension on the part of the defendant as to the nature of his contractual obligations on the effect of their performance. But it should be noted that it is necessary, rather than to regard the

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8. Fife v Clayton (1807) 13 Ves 546.
Smith v Hughes (1871) LR LR6 QB

9. Bernes v Fleming [1925] All ER 557

making of an error or misapprehension as an independent discretionary consideration in itself, to treat it as a matter which, together with additional circumstances, may affect or give rise to other discretionary considerations, such as hardship of performance or unfairness.

K (ii) EQUITABLE MISTAKE

There is a clear distinction between common-law mistake and equitable mistake since the High Court of Australia's judgment in Taylor v Johnson.[1] However where an order is sought for specific performance, it is not necessary to pursue an analysis of the nature of the right to equitable rescission through the mistake of one of the parties.

What are here being considered are the circumstances in which a court of equity will decree the specific performance of contractual obligations. Specific performance is a discretionary remedy, and it is well established that the discretionary considerations on which relief is refused may include matters arising through mistake or error of one or both of the parties.

Specific performance may indeed be refused in many cases where there is neither legal nor equitable mistake. However, where there is legal or equitable mistake proved, specific performance will necessarily be refused. Therefore it will often be found that the party wishing to enforce the performance of the material agreement will not be prevented from establishing such legal rights as he may be found to have; but he will simply be refused special assistance in equity.[2]

The case of Taylor v Johnson[3] cannot be overlooked even though it does not directly consider specific performance. The case provides an insight into the "modern" approach to mistake in Australia and adds fuel to the fire of flexibility and width which now pervades equitable remedies.

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1. 45 ALR 265

2. Malins v Freeman (1837) 2 Ke 25;
   Webster v Cecil (1861) 30 Beav 62.

3. 45 ALR 265.

Taylor v Johnson involved a "unilateral" mistake, sometimes known as a "mutual" mistake. In this case it refers to the situation where one party to a contract proceeds under a mistaken assumption. Mrs Johnson granted Mr Taylor an option to purchase ten acres of land for $15,000. The option was exercised and Mrs Johnson entered into a written contract with Mr Taylor's nominees. Subsequently, Mrs Johnson declined to perform the contract. She had mistakenly believed the price in the option and the contract to be $15,000 per acre. Specific performance was sought against Mrs Johnson. At first instance specific performance was ordered on the basis that Mrs Johnson was mistaken as to the price. It was found that Mr Taylor was unaware of the mistake. In the Court of Appeal their Honours substituted their own conclusion that Mr Taylor did believe Mrs Johnson was mistaken and set aside the contract. The High Court found it unnecessary to go beyond drawing a general inference from the evidence that Mr Taylor and Mrs Johnson each believed that the other was acting under a mistake or misapprehension either as to price or value in agreeing to a sale at the purchase price which he or she believed the other had accepted.

Initially their Honours considered mistake at common law, they then progressed to consider the scope of the basis upon which relief in equity was available from the contractual consequences of unilateral mistake. Their Honours quoted a passage from the judgment of Dixon C.J. and Fullagar. J in Svanios v McNamara[4].

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4. (1956) 96 CLR 186.

" Mistake might, of course, afford a ground on which equity would refuse specific performance of a contract and there may be cases of mistake in which it would be so inequitable that a party should be held to his contract that equity would set it aside. No rule can be laid down a priori as to such cases ... but ... it is difficult to conceive any circumstances in which equity could properly give relief by setting aside the contract unless there has been fraud or misrepresentation or a condition can be found expressed or implied in the contract. "

In relation to this passage the majority stated "Presumably their Honours were referring to "fraud" in the wide equitable sense which includes unconscionable dealing. If they are not, we do not share the difficulty to which they referred. To the contrary, it seems to us that the reported cases, including Solle v Butcher[5] itself readily provide concrete examples of such circumstances.

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5. [1950] 1 KB 671

The primary authority which their Honours employed in support of their view of the equitable jurisdiction was Torrance v Bolton.[6] The following proposition of law was formulated by Mason A.C.J, Murphy and Deane J.J " a party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension. "[7]

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6. (1872) 8 Ch. App 118. This case "explained the basis upon which a contract for sale was set aside in a case of unilateral mistake as being the ordinary jurisdiction of equity to deal with any instrument or transaction in which the court is of the opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained. Special circumstances will ordinarily need to be shown before it would be unconscientious for one party to a written contract to enforce it against another party who was under a mistake as to its terms or subject matter.

7. 45 ALR 265 @ 272.

It is conceded the above statement is directed towards rescission of a contract. However, justification for the investigation of this case with respect to specific performance is gleaned from the general attitude of the court towards matters equitable. Further Taylor v Johnson illustrates the Australian High Court's most recent attitude towards equitable mistake and equitable notions generally.

K (iii) HARDSHIP ON THE PART OF THE DEFENDANT

Where a mistake or error is relied upon by the defendant as giving rise to hardship, it is not sufficient that he can merely show that performance of the agreement would cause him greater inconvenience than he had expected, he must be able to show that any such inconvenience or hardship would be so oppressive that it would be unjust in all the circumstances - regard being had especially to prejudices to the plaintiff if performance in specie does not take place - to order specific performance.[1]

In deciding whether enforcement would be unjust the court will take into account both any right of the plaintiff to obtain damages at law and of any power to award damages at equity or compensation. All the circumstances of a mistake must be taken into account in determining whether it would be just to grant relief. Therefore, it is material to enquire whether the error of the defendant was, or was not, negligently conceived on his part. As to the reasonableness element of a supposedly negligent mistake, Watson v Marston[2] points out that "what is more or less reasonable is not a thing that you can define, it must depend on the circumstances of each particular case ".[3]

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1. Slee v Warke (1949) 86 CLR 271
2. (1853) 4 DeG M & G 230.
3. Ibid 234.

In some situations, difficulties of hardship can be overcome and enforcement of material obligations obtained, if the plaintiff is prepared to accept limited relief. These are cases where, although specific performance would not otherwise have been ordered, the plaintiff is willing to contend himself with performance as understood by the defendant, or to waive the objectionable terms in question, so that it cannot be said that the grant of relief is unjust and unreasonable.[4]

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4. Spry "Equitable Remedies" 2nd Ed @ 155 citing Baskcomb v Beckwith (1869) LR 8 Eq. 100 @ 109 and Preston v Luck (1884) 27 Ch D 497.

K (iv) CONTRACTUAL MISTAKES ACT 1977

Section 5 (3) of the Contractual Mistakes Act 1977 provides ...
"Nothing in this Act shall deprive a court or an arbitrator of the power to exercise its or his discretion to withhold a decree of specific performance in any case. "
The principal application of the Act involves a court in considering if the mistake postulated fits the statutory criteria of mistake and secondly the court is then to have regard to its powers under Section 7, such powers allowing a court to entertain a number of options including inter alia cancellation and validation on terms.
There will still be many instances where a mistake does not fall within the criteria of the act the normal common law and equitable rules apply. Hence if specific performance of the particular contract is sought the equitable defence of mistake comes into play.
A third situation arises, which it is submitted explains the enactment of Section 7.5(3) of the Act. In this instance, the Act applies, however a court under Section 7 may refuse to cancel the contract and allow partial or complete performance of the contract. It is ventured that in this situation, because Section 5 (3) preserves the equitable power to withold specific performance on the ground of mistake, a court must consider whether on equitable grounds performance of the contract should be refused. If such an investigation proves that no equitable defence can be made out, then the court may proceed to order such relief under Section 7 as it sees fit.

It is conceded when a court is required to consider the validity of the contract when assessing specific performance, the fact that the Contractual Mistakes Act 1977 is a code necessitates the rules of common law have been superseded.

However, the whole matter is shrouded by the all-embracing discretion with regard to relief that a court is invested with under Section 7. Before the enactment of the Contractual Mistakes Act 1977 a mistake would lead to the complete breakdown of the consensus ad idem and therefore the contract. By virtue of Section 7 of the Act a court may not only cancel a contract but also "declare the contract to be valid and substituting in whole or in part or for any particular purpose" or "grant relief by way of variation of the contract" or " grant relief by way of restitution or compensation " and " any order made under this section ... may be made upon and subject to such terms and conditions as the court thinks fit". It is ventured that such a discretion is tantamount to conveying to the court a general "equitable" jurisdiction to decide matters upon the circumstances of each individual case basing its decision of justice of "conscience" rather than being ensnared with the rigidity of common-law principles. A court of equity also has the power to vary a contract or award compensation. It is ventured that Section 7 is a codification of the equitable discretion to refuse specific performance on the grounds of mistake coupled with ancilliary provisions.

K (v) ILLUMINATING THE TREND - CONLON v OZOLINS

In 1984 the Court of Appeal decided Conlon v Ozolins[1], arguably the most significant case on mistake decided by a New Zealand court. The judgment of the majority continues with that courts underlying recent intention of deciding matters upon the ground of what is fair in the circumstances.

Woodhouse P. opens his judgment with a line which sets the tone for the following pages ... " Mrs Ozolins is an elderly widow who made a mistake".[2] Mrs Ozolins contracted to sell a large area of land which abutted her back garden. A contract was signed, but the legal description in the contract encompassed not only the sections but also Mrs Ozolins' back garden. In that situation Mrs Ozolins refused to go through with the sale, and the plaintiff brought proceedings in the High Court for specific performance. The High Court[3] decreed specific performance, and the case at hand is the appeal from such decision.

With respect to this paper the judgment of Woodhouse P. begins promisingly with the following comment .. " Has the court jurisdiction in terms of 5.6(1)(a) [of the Contractual Mistakes Act] in a factual situation of the kind outlined to examine the question of discretionary relief? "[4]

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1. [1984] 1 NZLR 489 @ 496
2. Ibid 496.
3. Reported [1984] 1 NZLR 489
4. Ibid @ 497

It was accepted by the appellant that to gain relief under the Act it must be in terms of Section (1)(a)(iii), such section intimating that the vendor on the one side and the purchaser on the other were "influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact ..."
Woodhouse P. analysed the facts and found that the respective decisions of the parties to proceed and finally to enter into the written contract were influenced by a mistaken belief on the one side that was different from the mistaken belief on the other side and moreover, each mistake was about the size of the land to be bought and sold. Finding that Section 6 applied and there was a mistake, it was necessary for the court to make an assessment of damages under Section 7 seeing as the claim for specific performance would fail.
The second judgment in the case was delivered by McMullin. J .
His Honour expressly overruled the case of McCullough v McGrath[5] (a decision of Mahon. J) which held that a person could not by reason of execution of an agreement invoke the Contractual Mistakes Act 1977, because of an estoppel. However McMullin. J considered that "this would severely restrict the operation of the Act itself. "
Somers. J delivered a dissenting judgment. His Honour, while not expressly referring to McCullough v McGrath[6], upheld the doctrine of estoppel by conduct with regard to assent to a contract. His Honour went on to hold that Mrs Ozolins intention "was discoverable from the words of the contract".[7] And that her mistake was truly "unilateral", it was unknown to the purchaser. In short, the purchaser made no

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5. [1981] 2 NZLR 428.

6. Ibid.

7. Ibid @ 507.

mistake at all. "He intended to buy the four lots described to and inspected by him, and that, according to the agreement, is what he did. Having decided that the Contractual Mistakes Act did not apply His Honour dealt finally with the relief to be ordered ..." Commonly where specific performance is resisted in the case of mistake which does not prevent the existence of a contract and does not afford grounds for rescission some ambiguity in the agreement or some, albeit innocent, misrepresentation by the plaintiff must be shown - see Tamplin v James[8]; Swaisland v Dearsly.[9] But it has been said and may be accepted for the present case that a decree may be refused even where the mistake is that of the defendant alone and has not been induced or contributed to by the plaintiff if to order specific performance would be "highly unreasonable" - Stewart v Kennedy.[10] Despite the fact that this is a dissenting judgment we have a condensed commentary on mistake as a discretionary defence to a decree in New Zealand, in that last quote of Somers. J. His Honour then applied this statement of the law. Such application Somers. J considered, involved a balancing of the interests and conduct of the parties. In this case the vendor was genuinely mistaken, a price less than the value of the four lots was received, she would lose her home and garden and her lifestyle.

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8. (1880) 15 Ch D 215.

9. (1861) 29 Beav 430

10. (1890) 15 App Cas 75

Balanced against this, the responsibility for the mistake rested with Mrs Ozolins and to refuse the decree would be a hardship to the plaintiff who entered other transactions relying upon his ability to purchase the four lots. Hence His Honour found that the contract should be specifically performed.

It is a pity that the other members of the court did not have to comment upon the equitable discretion to refuse specific performance because of mistake.

Putting aside the reasoning which Woodhouse P. and McMullin. J used to bring the "mistake" within the Act their decisions with regard to specific performance illustrate a difficulty that was not properly considered by their Honours, that being that if a mistake falls within the definition of mistake under the Act and under Section 7, the contract is validated in part or in whole, it may be that performance would have been refused under the equitable discretionary principle of mistake remembering that such principles are preserved by Section 5(3) of the Act.

It is considered that the most important feature of this landmark case to the overall scheme of this paper is the overruling of the decision of His Honour Mr Justice Mahan in McCullough v McGrath.[11] Here we have, with respect, a "black letter judge" an advocate of the old school and of the law as it stood at the turn of the century in its rigidity. Such Judge, in the wake of the resurgence of fairness and the broadening of discretions has not only been overturned on a fundamental point on mistake, but recently his decision in Avondale Printers v Haggie[12] was

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11. Supra n.5

12. [1979] 2 NZLR 124

rendered a backwater by the Court of Appeal in Hayward v Giordani[13], and it is humbly ventured that the decision in Carly v Farrelly[14] given the trend expounded will not last.

In summary, while the decisions of Woodhouse P and McMullin. J may not be applauded by many for their reasoning, their purpose is striking and clearly stated. They intend not to fetter the Act, they intend to allow its growth. Not uncultivated growth, but growth that will be checked from time to time by decisions of that court as to cases which arise close to the elasticised boundaries of the law created by the court.

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13. [1983] NZLR

14. [1975] 1 NZLR 356

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MISREPRESENTATION

At common law any misrepresentation, whether fraudulent, innocent or negligent could be a bar to the enforcement of the contract by the party responsible for the misrepresentation. Hence if the defendant can establish a misrepresentation he has a right to cancel, and it follows as a matter of course that specific performance will not be ordered against him, as there will be no contract in existence to perform.[1]

Once again we have a distinction, this time being drawn between misrepresentations capable of leading to cancellation and on the other hand misrepresentations not capable of giving ground for rescission but being able to defeat an application for specific performance.[1a] A vital point being that rescission has the drastic effect of avoiding the contract for all purposes, while refusing specific performance leaves it open to the plaintiff to seek other remedies, such as damages.[2]

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1. Electronic Industries Ltd v Harrison & Crossfield ANZ Ltd [1966] 2 NSWR 336. Re Bannister (1879) 12 Ch D 131; Hope v Walters [1900] 1 Ch 257; Cadman v Horner (1810) 18 Ves 10 ; Clermont v Tasburgh (1819) 1 Jac&W 112; Re Terrey and White's Contract (1886) 32 Ch D 14.

1a. See Cadman v Horner (Supra n. 1) and Re Bannister (Supra n.1) also Caballero v Henty (1874) 9 Ch App 447; Redgrave v Heard (1881) 20 Ch D 1; Jacobs v Revell [1900] 2 Ch 858.

2. Fenn v Craig (1838) 3 Y & C Ex 216.

Aaron's Reef's v Twiss[2a] establishes that it is commonly good practice to seek rescission if possible, rather than to wait and raise the defence of misrepresentation if a specific performance action is brought, particularly as in the latter case the burden of proof rests on the defendant to show that he repudiated the contract upon, or at least within a reasonable time after, discovery of the truth.[3] Moreover a right of rescission may have arisen but may also have ceased by the time at which the court proposes to make its order. It also must be borne in mind that merely because a right of rescission has been lost through laches or waiver, for example, it does not necessarily mean that the considerations which formerly would have been taken into account as founding a right to rescind may not be taken into account subsequently where a court of equity is asked to exercise its discretion by ordering specific performance.[4]

2a. [1896] AC 273 @ 293.

3. United Machinery Co of Canada v Brunett [1909] AC 330;
Dawes v Harners (1875) LR 10 CP:
First National Reinsurance Co v Greenfield [1921] 2 KB 260

4. The nature of the misrepresentation may not enable the representee to rescind the contract but its existence will be a sufficient defence to an action for specific performance; Holliday v Lockwood [1917] 2 Ch 47, where a representation induced the plaintiff to buy only one of two adjoining lots and specific performance of the sale of both was denied;
Peacock v Penson (1848) 11 Beav 355;
Myers v Watson (1851) 1 Sim NS 523.

The principles must be used with caution in cases where there has not at any time existed a right to rescind because, for example, the misrepresentations[5] relate to matters of opinion or of the likelihood of the occurrence of particular future events.[6] If in such a case proceedings for specific performance are brought, in principle it is difficult to see why misrepresentations as to future events or matters of law should not be investigated. Even if such misrepresentations do not fit within the discretionary category of "misrepresentations" they may still be considered in part with regard to the all-embracing categories of defence, those being hardship and fairness.

In general, in each situation where a court must decide whether a decree should lie or not, a court looks to all matters which may render it more or less just and reasonable to grant relief and it is not inclined to accept restrictions or limitations based upon what would be appropriate in the course of proceedings for rescission.

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5. Oral evidence is admissible to prove such misrepresentations:
Flood v Finlay (1811) Z Ball & B 9;
Winch v Winchester (1812) 1 Bes & B 375.

6. Lamare v Dixon (1873) LR 6 HL 414;
Re Bannister (1879) 12 Ch D 131
Hence a representation of a less serious nature than that required to rescind a contract it may be sufficient to resist performance. Note: Specific performance may be denied because rescission is no longer possible
Hope v Walters [1900]1 Ch 257 - where a vendor innocently misrepresented that the property was an investment and the tenant actually used it as a brothel.

While an innocent misrepresentation may not provide sufficient grounds for rescission, with regard to specific performance such a representation may avoid the decree. For instance a vendor's solicitor innocently represented to a purchaser that the vendor had not executed a deed in favour of the local council waiving certain compensatory rights in Electronic Industries Ltd v Harrisons & Crossfields (ANZ) Ltd[7]. The court found as a fact that the representation was a material one and even though it was made innocently it was a ground to refuse a decree of specific performance.

The Supreme Court of Ireland provides the most recent overview of this defence in Smelter Corporation of Ireland Ltd v Abing O'Driscoll[8]. Mrs O'Driscoll contracted to sell her lands to the plaintiff company. Mrs O'Driscoll had been reluctant to sell her lands, and during the course of the plaintiff's efforts to persuade her to sell, an agent for the plaintiff had stated to her that, if she did not agree to sell her lands to the plaintiffs, the local authority would exercise its statutory powers so as to acquire the lands compulsorily. Although the agent believed his statement to be true, there was no foundation for it. Mrs O'Driscoll believed this statement to be true. In the course of events the sale was not completed and the plaintiff company sought a decree of specific performance. The court noted that specific performance was a discretionary remedy. Moreover, that by reason of the plaintiff's misrepresentation, Mrs O'Driscoll had been under a fundamental misapprehension about the true facts, and that it would be unjust to grant a decree in the circumstances. Hence we

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7. [1966] 2 NSWLR 336.

8. [1977] 1 IR 305

see the court having regard to the facts at hand and considering these in light of the concepts of fairness and justice. In short, precedents are not slavishly followed, and as is the present trend in things equitable, a flexible and just approach is taken.

An unusual difficulty arises when a contract for the sale of land is sought to be enforced. Here it is often found that there is a misrepresentation or misdescription of either the title of the vendor to the land or of its dimensions or characteristics, and yet, as has been alluded to earlier, the purchaser will in many cases be forced to accept, or the vendor forced to convey, the material land with compensation in respect of the error. Such a situation arose in New Zealand Trust and Loan Co v Coe.[9] In this instance an agreement for sale and purchase provided that the survey to be made of the area sold should follow as closely as possible the boundaries shown on the plan. However the surveyor did not follow these exactly. It was found that the defendant had materially misled the purchaser as to what he was purchasing. The purchaser understood he was purchasing upward of 500 acres of ploughable land, and from 160 to 200 acres of rough land. The survey resulted in the purchaser obtaining 300 to 400 acres of rough land. Sim. J felt this was clearly a case where specific performance would be refused. However this case was unusual in that the purchaser was not disputing specific performance, on the contrary he was very keen to acquire the land. All he wished was to have the contract varied to take account of the rough land. His Honour felt that the discrepencies were so large that if he did this he was as good as writing a new contract,

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9. (1910) 12 GLR 550

and he could not do this. Therefore he awarded specific performance, subject to an inquiry as to abatement. It is submitted that this is a classic example of a court of equity at work in its purest form. By adopting a more rigid approach, the contract may have set aside even though the parties were both still intent on a sale.

As has been noted the question of whether specific performance shall be refused given a misrepresentation is present, depends largely on the circumstances at hand. No area is more subject to this principle that the consideration of whether a representation is a mere puff or is worthy of examination. For instance in Bramley v Parrott[10] A and B agreed to exchange leases. A represented the land comprised in his lease to be well timbered. There was evidence to the fact that A's land had a considerable quantity of timber on it fit for the purpose required. B was a sawmiller and refused to complete the contract on the grounds that A's land was not well timbered. A sued for specific performance. Holroyd. J in the Victorian Supreme Court held that A's representations were within the class of vague and indefinite commendations which amounted to mere puffs and which ought to put a purchaser on inquiry. If there had been little or no timber, A's statement to that effect would have been enough to refuse the decree, so commented Holroyd. J. However, given the circumstances performance was decreed. To highlight this principle the case of Learmoath v Morris[11] provides a useful contrast. In that case the defendants offered their mining claim for sale to the plaintiffs

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10. (1869) 2 Ch 379

11. (1869) 6 WW & AB 74.

by their agent B, who made some mis-statements disparaging the value of the defendant's claim. It was found that the agent had mis-stated his view and generally untruly and even fraudulently disparaged the property and that he had used some artifice to mislead the vendors on the subject. It was held that the plaintiffs were not misled or induced to enter into the contract by them and hence the matter was a fit matter for an equity suit. Therefore the decree was affirmed.

A further distinction arises between misrepresentations of fact and law. Do these have the same effect when considering refusal of a decree? Kaye. J turned his mind to this problem in Public Trustee v Taylor[12]. Land for sale was advertised as "zoned: special use 10, subject to road widening. " It was in fact not zoned as stated, but it was reserved for the purposes of a proposed main road. The purchaser purported to rescind the contract for misrepresentation, and the vendor sued for specific performance. Kaye. J was of the opinion that it would have been necessary, for the purpose of deciding whether the land was zoned as represented, to consider the relevant town planning legislation and instruments involving applying the law to the location of the property, the statement in the advertisement was a misrepresentation of law. His Honour went to conclude that equally with a mis-statement of fact, a mis-statement of law knowingly made will support an action for deceit and give the innocent party a right of rescission of a contract

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12. [1978] VR 289

induced thereby and a defence to an action for specific performance.[13] If an agreement is in part performed by one of the parties, it is too late for the others to complain of fraud, surprise or misrepresentation ; for a court of equity will decree a specific enforcement of the remaining part of it.[14]

A gloss on this principle arises through Holliday v Lockwood.[15] Here a purchaser separately acquired two lots of property at an auction in reliance on an innocent misrepresentation which pertained to the second lot. It was clear that rescission would be granted with respect to the second lot. However there would have to be some element of interdependence if rescission was to be effective against the first lot. Moreover, if the court was satisfied that, apart from the misrepresentation, the particular purchaser would not have brought either lot, it will refuse the vendor specific performance as to the first lot.

A party obtaining an agreement by a partial misrepresentation, is not entitled to specific performance, on waiving the part affected by the misrepresentation. The effect of partial misrepresentation is not to alter or modify the agreement pro tanto, but to destroy

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13. Brereton v Cowper (1724) 1 ER 241
Wall v Stubbs (1815) 1 Madd 80

14. Anglesey v Anglesey (1741) 1 Bro Parl Cas 289

15. [1917] 2 Ch 47.

it entirely and to operate as a personal bar to the party who has practised it.[16]

Colby v Gadsen[17] considers the effect of an agreement for sale to a third party after the initial sale had been induced by misrepresentation. In this case a purchaser agreed to buy an estate, in reliance upon a statement in the particulars of sale that the property lay upon a valuable vein of coal, which vein afterwards proved to have been mostly worked out. Subsequently, in an effort to cut his losses, the purchaser entered into an agreement with a third party to sell the colliery at a price implying the existence of a considerable quantity of coal. It was held that the transaction between the purchaser and the third party did not invalidate the purchaser's defence of misrepresentation to a bill by the initial vendor for specific performance, although it might have been an answer to a claim by the purchaser for an abatement of the purchase money.

The law as regards misrepresentation in New Zealand underwent a fundamental change with the passing of the Contractual Remedies Act 1979. As with the Contractual Mistakes Act 1977 the former Act contemplates the law relating to specific performance by providing in Section 15 "Except as provided in Section 4(3), 6(2) and 14 of this Act nothing in this Act shall affect - (a) the law relating to specific performance or injunction. " Sections 4(3), 6(2) and Section 14 purtain to the Sale of Goods Act.

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16. Bartlett v Salmon (1855) 6 DeG M & G 33;
Clermont v Tasburgh (1819) 37 ER 318.

17. (1867) 17 LT 97.

Assuming a misrepresentation is found, there is no longer rescission available at equity as Section 7 of the Act replaces the existing rules both at equity and common law governing discharge for breach and repudiation. The scheme of Section 7 is to allow parties to cancel a contract in certain cases but not otherwise. Therefore a misrepresentation may lead to a cancellation of the contract and necessarily specific performance is excluded. Alternatively Section 7 may allow the contract to stand. In this instance performance of the contract is possible, but because of the savings provision in Section 14, such performance will still be subject to the equitable discretionary defence of misrepresentation. Hence the terms of the Act may not allow cancellation, but an examination of the equitable defence may effectively obtain this objective.

In support of the above proposition, one should note that specific performance is an equitable remedy and for this reason it has a special nature. If parliament intended to change the conscience based nature of the remedy, they would surely have done what countless legal systems have not done for centuries and codify the power of a plaintiff to seek enforcement of his contractual rights.

If a plaintiff preys in his statement of claim for specific performance, could a defendant specifically plead the contractual remedies act as a defence and pointedly claim cancellation of the contract? There is as yet no answer to this question. It would appear prudent for a solicitor in a situation where a decree was being sought to first plead the Contractual Remedies Act and apply for cancellation and then in the alternative plead that there was a representation amounting to an "equitable misrepresentation" .

(This assumes that there are no facts supportive of a direct claim for cancellation.)

However there remains the difficulty of Section 15. It is likely that prima facia the first abovestated ground of defence is in operative, as Section 15 is clear that the Act does not apply to specific performance. But could not a defendant claim that he was not setting the Act up as a defence to Specific Performance, but rather as a completely separate remedy?

In summary, misrepresentation as a discretionary defence would appear not to be effected by the Contractual Remedies Act 1979. The substantial difference arises in the ability of a court to bring to an end a contract as a whole and thereby preclude any thought of specific performance. Such cancellation is presently governed solely by the terms of Section 7, but as case law develops as a result of the Act, the bounds of cancellation may draw closer to the old common law and equitable grounds of rescission.

CONCLUSION

Having viewed some selected aspects of specific performance, it is worth considering the general comments of Fry with regard to the performance of contracts ; "When we consider how large a part in the affairs of modern society is played by contracts and the resulting rights and obligations, and how plainly the right to insist on the actual execution of contracts flows from their very nature, it is at first sight a remarkable circumstance that many systems of jurisprudence seem to make no direct provision for it .... it seems probable that no such elaborate attempt to enforce the actual performance of contracts as that made by the Courts of Equity in this country exists in any other system of jurisprudence ".[1]

Given that the above statement is of some sixty years' vintage, it is ventured that the place of the contract in society nowdays has assumed a greater importance, hence the method of enforcement also must have moved with the times.

Is the enforcement of contracts by equitable means elaborate? On the face of it the remedy is governed by a labyrinth of rules and exceptions. Constantly subject to change as new cases are decided. But how deeply do these new cases penetrate the underlying principles? Are they not merely particular fact situations which are still governed by the common criteria of conscience? Further, is not the actual seeking of a decree quite uncomplicated? That is, one either obtains performance or fails to because of counterveiling common-law or equitable circumstances. The elaboration and confusion only arising once it is

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1. Fry "Specific Performance" 6th Ed @ 3-4.

realised that a decree is not to be granted, and the vexing question of damages entering the fray.

It is submitted that the House of Lords have isolated and successfully grappled with this difficulty. Johnson v Agnew clarifies not only the difficulty as to the awarding and quantification of damages but it also goes a distance towards crystallising the highly technical area concerning election of remedies (i.e. election between specific performance and damages). In short this aspect of specific performance relating to damages has been "a mess"[1] and Fry was correct in considering it prolix.

Has the method of enforcement moved with the times? Here is the reason why equity is designated the responsibility of administering the sanctity of contracts. The cornerstones of the remedy, fairness, conscience and justice have never changed. However the morals that determine what is fair and just at any given time have and hence the remedy has been able to keep abreast of social and commercial standards. For example, there was some judicial reluctance at the turn of the century to enforce testamentary dispositions as damages were considered to be an appropriate remedy. As noted this has been clarified in line with the general policy view that a testator not only owes a duty to his family (Family Protection Act 1959) but also that the grave will not allow him to escape his contractual obligations (Law Reform Testamentary Promises Act 1949).

If Fry is correct as to the elaborateness of equity's system and given that the common law does not provide for the enforcement of contracts, why has Parliament not intervened and codified the remedy? Having sought an insight into specific performance in this paper, the answer to the last stated question

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1. Madden v Keverski (1983) 1 NSWLR 305 @ 306 per Helsham C.J.

is clear. Because of the infinite variety of contractual situations in which performance is sought, and given the large number of common law and equitable considerations which come to bear on the question of whether performance is to be awarded or otherwise, a statute is too inflexible to provide for a comprehensive consideration of the factors which effect a decree (if that is what it would be designated by the statute). Further, concepts such as hardship and fairness, which are still much to the fore in determining the suitability of performance as illustrated by Patel v Ali, are intangibles, closely linked to the conscience of a court of equity.

Moreover the legislature itself has realised and acknowledged that specific performance is an extraordinary remedy and has allowed it to continue unimpeded (Contractual Remedies Act 1979, Contractual Mistakes Act 1976) while codifying much of the law surrounding it. It is ventured the wide judicial discretions embodied in the abovementioned statutes (as well as the Contracts Privity Act 1983 and the Illegal Contracts Act) add to the trend towards simplification and a retreat to the facts of each case. The underlying theme of conscience coming to the fore.

The origins of specific performance for arguments sake appear to be rooted in the Court of Chancery. The doctrine began as an ideal, that a contracting party could not avoid his obligations to perform a contract without also breaching a moral duty he owed to the other party involved in the contract. The principle was based on conscience, and its application was purely discretionary. With the passage of time a body of law has evolved over the doctrine. Initially, Lord Eldon

did much to circumscribe the limits of this "judicial" discretion by prescribing many of the defences to an action for specific performance. Latterly these parameters have been examined and adopted in the myriad of cases before the courts concerning specific performance. Over the years, it is submitted, the underlying rationale of the doctrine has become glossed over by a veneer of case-law, and in certain areas the idea of conscience has been lost from sight (of inter alia damages, third parties).

It is submitted that the veneer is presently being stripped away, not only with respect to specific performance but also with regard to all matters equitable, as is highlighted by the High Court of Australia in Taylor v Johnson. There can be no doubt that there are members of the judiciary who are breaking through the gloss - who are taking each case on its own facts and merits as opposed to being "blinkered" by precedent. This "melt-down" and re-emergence of first-principle is best illustrated by Johnson v Agnew. In this case the distinct and parallel courses of equitable and common law damages have been significantly altered and now aline as they did some two hundred years earlier.

The approach adopted in the more recent cases (notably inter alia Johnson v Agnew, Taylor v MacLachlan, Colon v Ozolins) is not one which allows equitable defences and considerations to be made out more readily, but that a broader attitude is being taken to their all round application. That is not only are extended considerations as to the refusal of a decree being examined but also counterveiling factors as to why the contract should be enforced from

the point of view of the plaintiff are receiving increased investigation. This investigation as to the position of the plaintiff prevents the equitable defences being more easily made out.

Several of the equitable defences (inter alia Mutuality and Impossibility) still proceed in strict accordance with the case law built up around them. However even these areas are subject to review as Price v Strange demonstrates with regard to mutuality.

What can be drawn from the facts involved in specific performance cases generally? Few cases involve straightforward sale-and-purchase of dwelling houses between the average man. It is submitted this is because a vendor (unless of substantial means) stands to lose more than he will gain by commencing an action for specific performance. Not only will the financial cost be high, even if a decree is obtained, but also his property will be off the market, this point being relevant in the event of the court refusing a decree, refusal being quite possibly given the numerous hurdles to a decree particularly in harsh economic times where the defences of hardship and impossibility (due to lack of finance) are prevalent. While damages can repair some of the loss involved, considerations such as inconvenience, expenses incurred if the vendor had to settle a purchase, legal fees, difficulty in obtaining a fixture date, and generally stress and emotional worry (factors the average man is affected by more so than a company), are difficult to compensate for.

Couple this inaccessibility of the remedy to the lot of a busy conveyancing solicitor who must be constantly on guard against making an election or waiving a course of action which will prejudice his client's right to the remedy in the future, and the difficulties

associated with the practical application of the remedy become evident.

It is submitted that one of two alternatives could be used to diminish the abovestated problem. On the one hand the legislature could provide the High Court with a Chancery Division, much the same as the Federal Courts in Australia have. This Division would process matters apace and thereby, hopefully, limit the cost factor. On the other hand, and more practically, it is ventured that the District Court's jurisdiction could be extended as to the issuing of decrees. This extension should increase the upper limit of the District Court's jurisdiction to $100,000 with respect to specific performance. This figure contemplates the average price of residential houses in New Zealand.

There are many defences to the court awarding a decree which have not been touched upon including inter alia; laches, waiver, part performance, contracts involving continuing obligations. Moreover several major aspects relating to the mechanism of specific performance have not been considered because of space constraints and the lack of case law movement in these areas, they being inter alia : the use of injunctions to enforce contracts; the adequacy of common law remedies as opposed to specific performance ; the enforcement of a decree for specific performance.

It is suffice to close with the words of Romilly M R who succinctly notes the theme evidenced by this paper ; that while specific performance is to be exercised according to a discretion there need still be <u>some</u> rules to govern the same :

> " The discretion must be exercised according to fixed and settled rules; you cannot exercise

a discretion by merely considering what, as between the parties, would be fair to be done ; what one person may consider fair, another person may consider very unfair ; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. "

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